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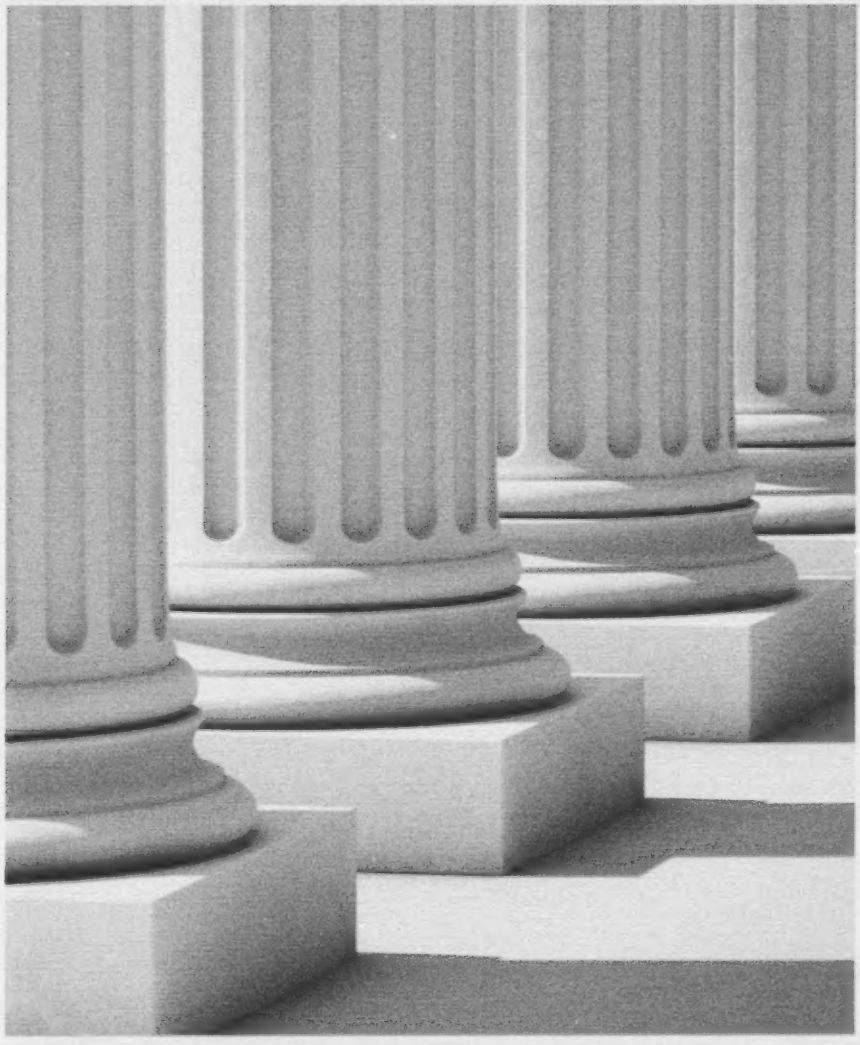
ASSISTED REPRODUCTION AFTER DEATH: PARENTAGE & IMPLICATIONS



FINAL REPORT

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MARCH 2015

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ASSISTED REPRODUCTION AFTER DEATH: PARENTAGE AND IMPLICATIONS

FINAL REPORT **106**

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on January 1, 1968 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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The underlying research for this report was carried out by Elizabeth Robertson, Counsel. Following her retirement, carriage of the project passed to Sandra Petersson, Research Manager, who undertook further analysis and the writing of this report. Additional research was completed by Katherine MacKenzie, Research Associate. Student assistance was provided by Kathryn Griffin. Jenny Koziar prepared the report for publication.

Summary

The idea of recognising parentage and inheritance rights for children born after the death of one of their genetic parents has been part of the common law for centuries. However, these provisions have only applied to children *en ventre sa mère*. In other words, parentage and inheritance rights are bestowed upon those children who are in utero at the time of a parent's death, provided they are subsequently born alive.

Advancements in reproductive technology mean that storage of reproductive materials and conception by assisted reproduction are achievable. Further, it is possible for assisted reproduction to occur after the death of one of the genetic donors. In other words, children may be conceived after the death of one of their genetic parents by using the deceased parent's stored reproductive material. Given this prospect, it is appropriate to consider the legal status of such "after-born" children.

Recognizing Parentage

Alberta's *Family Law Act* ["FLA"] recognizes parentage if there is a genetic link between the parent and child. If the genetic link is absent, parentage is based on consent to parent. The FLA sets out certain presumptions regarding who will be considered a parent of a particular child. Specifically, sections 8.1 and 8.2 govern parentage in situations where assisted reproduction has been used to conceive a child during the lifetime of the genetic donor.

Section 8.1 applies when the assisted reproduction procedure does not involve the use of a surrogate. It canvasses three possible scenarios: (i) both a male person and a female person provide reproductive material; (ii) only a male person provides reproductive material; and, (iii) only a female person provides reproductive material. Under the first scenario, both genetic donors are presumed to be the legal parents of the resulting child. If reproductive material is only provided by one person, the presumptions identify the genetic donor and his or her spouse or partner as the legal parents.

Section 8.2 applies when the assisted reproduction procedure requires a surrogate. In order for the genetic donor to be recognized as a legal parent of the resulting child, the surrogate must consent and there must be a declaration of parentage. Such a declaration will establish that the surrogate is not the legal parent of the child, but the genetic parent is. Once there is a declaration in favour of the genetic parent, the Court can apply the presumptions in section 8.1 to identify the other parent.

Parentage When Assisted Reproduction Used After Death

In circumstances where the deceased parent is a male who has provided reproductive material that is used by his surviving wife or female partner after his death, the FLA recognizes him as a parent. However, there are procedural barriers in both the FLA and the *Vital Statistics Act* that prevent him from being registered as a parent on the child's birth certificate.

Where assisted reproduction after the death of one of the genetic parents requires the use of a surrogate, the deceased genetic parent is recognized as a legal parent of the child (provided the surrogate consents to a declaration in favour of the genetic parent). However, because the deceased's relationship with his or her surviving spouse or partner is ended by death, the surviving spouse or partner is not identified as the after-born child's other parent. Further, the spouse or partner does not have standing under section 8.2 to seek a declaration of parentage for the deceased parent or themself. Therefore, there are procedural barriers to recognizing parentage when assisted reproduction is used after the death of a genetic parent, regardless of whether a surrogate is used.

In ALRI's view, there is no principled reason to deny an after-born child the right to legal parentage. Denying legal parentage draws distinctions between an after-born child and other children of the deceased that were born during his or her lifetime. Given that parentage is being denied to an after-born child only because of the circumstances surrounding his or her conception and birth, such a denial would likely be considered discriminatory.

Consent

It is generally accepted that, in order for parentage to be established, the deceased must have given consent. However, there is a dispute over whether the consent must relate to the use of the deceased's stored reproductive material after his or her death, or whether it must include both consent to use after death and consent to be a parent of an after-born child. This Report takes the position that it is sufficient if the deceased gave consent to the use of his or her stored reproductive material for reproductive purposes after his or her death. The additional requirement of consent to parent is redundant and contrary to the policy basis of the FLA.

Therefore, ALRI recommends that, where the required consent is present, the deceased genetic parent should have the same basis for parentage as if the child had been born during his or her lifetime. If surrogacy is required, the deceased genetic parent's status will depend on whether the surrogate consents to give priority to the genetic parent. While there is no compelling reason to alter the priority already accorded to the rights of the surrogate, it is appropriate for the deceased's surviving spouse or partner to be given standing to apply for a declaration of parentage for the deceased genetic

parent under section 8.2. Further, the FLA should recognize the deceased genetic parent's surviving spouse or partner as a legal parent on the same basis as if the child had been conceived during the deceased's lifetime.

Implications of Recognizing Parentage for After-Born Children

Once parentage is established, the after-born child will be considered a child of the deceased for all purposes under the law. It is therefore necessary to consider what implications a recognition of parentage will have in other areas. This Report has considered the effect a declaration of parentage will have on naming rules, citizenship, dependents' relief, inheritance and intestacy rights, the rule against perpetuities, statutory survivor benefits, and survivor benefits under contract. After careful analysis, ALRI has concluded that identifying the deceased as a legal parent of an after-born child will have few implications in other areas of law.

This conclusion is based on the well-established legal principle that a person does not have enforceable legal rights until they are born alive. An after-born child has no legal existence at the time of his or her parent's death; therefore, the child has no legal ability to claim property or compensation from his or her deceased parent's estate. To hold otherwise would bestow legal rights upon a non-legal entity. Further, providing rights to after-born children would subject the rights of living persons to the potential claims of children not yet in existence. In other words, recognizing legal rights of after-born children would be detrimental to the rights of persons who are living at the time of the deceased parent's death.

If a parent wishes to provide for an after-born child, then he or she may do so by a carefully drafted will. However, in ALRI's view, there is no basis for the law to be changed in order to provide succession rights or other benefits to an after-born child.

Recommendations

RECOMMENDATION 1

Where a person provides reproductive material or an embryo and consents to its use for reproductive purposes after his or her death by a surviving spouse or partner, the court may, on application, declare that person to be a parent of a child conceived after that person's death on the same basis as if the child had been conceived through assisted reproduction during the person's lifetime. 23

RECOMMENDATION 2

Where a person provides reproductive material or an embryo and consents to its use for reproductive purposes after his or her death by a surviving spouse or partner, the surviving spouse or partner should have standing to apply for a declaration of the deceased's parentage where a child is conceived using the deceased's reproductive material or embryo and the child's birth mother is a surrogate 24

RECOMMENDATION 3

Where a person provides reproductive material or embryos and consents to its use for reproductive purposes after his or her death by a surviving spouse or partner, the surviving spouse or partner should be recognized as a parent on the same basis as if the child had been conceived through assisted reproduction during the deceased's lifetime. 25

Table of Abbreviations

LEGISLATION

AHRA	*Assisted Human Reproduction Act*, SC 2004, c 2
AHR Regulations	*Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137
FAA	*Fatal Accidents Act*, RSA 2000, c F-8
FLA	*Family Law Act*, SA 2003, c F-4.5
WSA	*Wills and Succession Act*, SA 2010, c W-12.2

LAW REFORM PUBLICATIONS

ULCC Report	Joint Uniform Law Conference of Canada (ULCC) – Coordinating Committee of Senior Officials (CCSO) Working Group, "Assisted Human Reproduction: Report of the Joint ULCC- CCSO Working Group" in ULCC, *Proceedings of the Ninety-first Annual Meeting* (2009), online: ULCC <www.ulcc.ca/en/2009-ottawa-on/192-civil-section-documents/396-assisted-human-reproduction-working-group-report-2009>.

CHAPTER 1

After-born Children

A. Introduction

[1] The idea of the law providing for after-born children is not new. For centuries, the common law made provision for parentage and inheritance for a child *en ventre sa mère*. This concept provided for paternity where a child in the womb at the time of the death of his or her father and was born alive after the death. The child would therefore be legitimate and not have a different status than his or her siblings. Similarly, a child *en ventre sa mère* at the time of an ancestor's death could inherit from the ancestor's estate. In many instances, the posthumous birth of an heir benefited the ancestor's estate as well as the heir, particularly where the estate was entailed and at risk of being lost to the family. The concept of a child *en ventre sa mère* is still reflected in modern legislation such as the *Wills and Succession Act* [WSA] and the *Family Law Act* [FLA] which include such children within the definition of "child."[1]

[2] While the concept of a child *en ventre sa mère* provides for children born within nine months, the law has not responded to the challenge posed by children born beyond this short time frame. Given that the *Assisted Human Reproduction Act* [AHRA] permits the use of assisted reproduction after death in certain circumstances, it is appropriate to consider the status of such after-born children.[2]

[3] Including a child *en ventre sa mère* as a child reflects the importance of establishing parentage and recognising family ties. These concepts are no less important for a child and the child's surviving family where a child is born using assisted reproduction after the death of a parent. Moreover, in stark contrast with the presumptions used to assign parentage in past centuries, new technologies allow parentage and family identity to be established with certainty. However, despite the fact that the law allows assisted reproduction after death and that

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[1] *Wills and Succession Act*, SA 2010, c W-12.2, s 28 [WSA] defines children to include "any child who is in the womb at the time of the testator's death and is later born alive." The *Family Law Act*, SA 2003, c F-4.5, s 8 [FLA] applies a presumption of parentage to a birth mother's former spouse or partner if the child was born within 300 days of the relationship's end.

[2] *Assisted Human Reproduction Act*, SC 2004, c 2 [AHRA]. Where the donor of reproductive material or embryos has given specific, written, witnessed consent, the donor's reproductive material or embryos may be used for reproductive purposes by the donor's surviving spouse or partner.

genetic parentage can be established with certainty, the law raises barriers to recognizing a deceased person as a parent.

[4] This report makes recommendations about how the law should address parentage for children born using assisted reproduction after the death of a parent. This report also reviews the consequences of recognising a deceased person as a parent and whether further changes to the law are required.

B. Prevalence of Assisted Reproduction and Stored Reproductive Material

[5] The number of couples who experience infertility is increasing in Canada. The latest figures estimate that between 12% and 16% of couples are infertile. This compares with 5.4% in 1984.[3] Worldwide, it is estimated that one in six couples have a problem with infertility at some point during their lifetime.[4]

[6] With respect to Alberta, the figures are also increasing. In 1998, 12,747 Albertans were diagnosed as infertile (9,122 women and 3,625 men). In 2007, there were 19,005 (11,936 women and 7,069 men).[5] The percentage increase in infertility over this period (49%) is much higher than the percentage increase in population for the same period (21%).[6] The impact on Alberta families is likely greater than the individual diagnoses of infertility show. Moreover, more than 10,000 new incident cases of infertility arise in Alberta each year.[7]

[7] A diagnosis of infertility is not the only reason to store reproductive material or embryos or access assisted reproduction. Gay, lesbian, bisexual, two-spirited, transgendered, transsexual, intersex, asexual or queer individuals or couples may access assisted reproduction for reasons not related to fertility. Individuals may also store reproductive material in the hope of extending their reproductive years. For example, military personnel may store reproductive material before serving in a war zone due to the risk of infertility from injuries.

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[3] Tracey Bushnik et al, "Estimating the prevalence of infertility in Canada" (2012) 27:3 Human Reproduction 738 at 740.

[4] European Society of Human Reproduction and Embryology, "ART fact sheet" (June 2014), online: European Society of Human Reproduction and Embryology <www.eshre.eu/sitecore/content/Home/Guidelines%20and%20Legal/ART%20fact%20sheet>.

[5] University of Alberta, Health Technology & Policy Unit, *Assisted Reproductive Technologies (ARTs): Final Report*, revised ed (2013) at 46 [ART Final Report].

[6] Alberta Office of Statistics and Information, *Population Data for 1998 and 2007*, online: Alberta Office of Statistics and Information <www.osi.alberta.ca/osi-content/Pages/OfficialStatistic.aspx?ipid=1184>.

[7] ART Final Report, note 5 at 46.

Medical conditions may also warrant storing reproductive material or using assisted reproduction. For example, people facing cancer may store reproductive material before cancer treatment. Some families may choose assisted reproduction to screen for genetic disorders or to prevent passing on transmissible diseases. And, as noted above, many couples will have stored reproductive material in connection with planned or past fertility treatments.

[8] As a result of all these reasons, the use of assisted reproduction in Canada is growing. The increase can also be attributed to higher success rates, decreasing cost of treatment and greater access.[8] In 2011, 23,722 *in vitro* fertilization procedures were performed in Canada which represents a 29% increase over the number performed in 2010.[9] It is difficult to estimate how often other procedures such as assisted insemination are performed in Canada due to the lack of reporting requirements. One estimate is that between 4 and 15 times more children are born as a result of assisted insemination as opposed to *in vitro* fertilization.[10]

[9] Since 2009, Alberta delivery records have included information on whether conception was assisted. As the information on conception is not recorded until time of delivery, there may be under-reporting.[11] However, for the three years ending December 2011, almost 3.5% of births, or nearly 4,000 children, were conceived using assisted reproduction. Nearly 2,400 of these births involved *in vitro* fertilization and are likely to have resulted in additional stored reproductive material or embryos, as would many instances of artificial insemination.

[10] There are no formal statistics on the number of children born using assisted reproduction after the death of a parent. However, anecdotal reports

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[8] Joint Uniform Law Conference of Canada (ULCC) - Coordinating Committee of Senior Officials (CCSO) Working Group, "Assisted Human Reproduction: Report of the Joint ULCC- CCSO Working Group" in ULCC, *Proceedings of the Ninety-first Annual Meeting* (2009), Appendix B at para 5, online: ULCC <www.ulcc.ca/en/2009-ottawa-on/192-civil-section-documents/396-assisted-human-reproduction-working-group-report-2009> [ULCC Report].

[9] Canadian Fertility and Andrology Society, *Assisted reproductive technologies (ART) in Canada: 2010 results from the Canadian ART Register* at 1, online: Canadian Fertility and Andrology Society <www.cfas.ca/index.php? option=com_content&view=article&id=1206%3Acartr-annual-report-2009&catid=1012%3 Acartr&Itemid=668>; Canadian Fertility and Andrology Society, *2011 CARTR Results* at slide 3, online: Canadian Fertility and Andrology Society <www.cfas.ca/index.php?option=com_content&view=article&id=1207:2011-cartr-results&catid=1012:cartr&Itemid=670>.

[10] Canada, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol 1 (Ottawa: Minister of Government Services, 1993) at 435, cited in ULCC Report at para 12.

[11] ART Final Report, note 5 at 47.

indicate that such births occur. Typically, such cases are brought to light when the child's mother finds that she is unable to register her deceased husband as the child's father or to give the child the father's last name. While the numbers of such after-born children are probably very low, that does not justify the law creating frustration for such families that other families do not face.

C. Terminology

[11] This report adopts the following terms which are defined in either the FLA, the AHRA or both:

"**Assisted reproduction**" means a method of conceiving other than by sexual intercourse.[12]

"**Embryo**" means an embryo as defined in AHRA, i.e., "a human organism during the first 56 days of its development."[13]

"**Reproductive material**" means human reproductive material as defined in the AHRA, i.e., "a sperm, ovum or other human cell or a human gene, and includes a part of any of them."[14]

"**Surrogate**" means a woman who carries a child with the intention of surrendering the child to another person, usually to the child's genetic parent.[15]

[12] This report also adopts the following terms which are either not defined in legislation or where the FLA and AHRA use different language:

"**After-born child**" means a child born alive using assisted reproduction where implantation of reproductive material or an embryo occurred after the death of the genetic parent who provided the reproductive material or embryo.[16] In this report, "after-born child" does not include a child

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[12] FLA, s 5.1.

[13] FLA, s 5.1; AHRA, s 3.

[14] FLA, s 5.1; AHRA, s 3.

[15] FLA, s 5.1; AHRA, s 3. In both definitions, the key point is the surrogate's intention to surrender the child.

[16] Much of the literature, and ALRI's Report for Discussion, Alberta Law Reform Institute, *Succession and Posthumously Conceived Children*, Report for Discussion 23 (2012), uses the term "posthumously conceived child". The reference to conception will be misleading in the context of embryos conceived before death. The reference to conception also fails to recognize the legal principle that a child must be born alive to take full benefit of the legal rights accorded to a person. Hence, this report adopts the term "after-born child".

en ventre sa mère as they are defined as children under the FLA and other legislation.

"**Genetic parent**" means, with respect to a child, a person whose reproductive material or embryo was used to bring the child into being. Terms used in other legislation:

- FLA
  - biological father
  - birth mother
  - person who provides human reproductive material or an embryo
- AHRA:
  - donor of reproductive material or embryo.

"**Intending parent**" means, with respect to an after-born child, the spouse or partner of the deceased genetic parent who had consent to use the deceased's reproductive material or embryos for reproductive purposes and who consented to be a parent of a child born using assisted reproduction. Terms used in other legislation:

- FLA:
  - birth mother
  - spouse or partner of the person who provides human reproductive material or an embryo at the time of conception and who consented to parent a child born as a result of assisted reproduction
- AHRA:
  - spouse or partner of the donor of reproductive material or embryo at the time of the donor's death who has the consent to use the material or embryo for reproductive use.

"**Partner**" means a person who was in a conjugal relationship of interdependence of some permanence with the genetic parent. Terms used in other legislation:

- FLA:
  - person who was in a conjugal relationship of interdependence of some permanence

- AHRA:
  - common-law partner.

D. Federal Regulation of Assisted Reproduction after Death

[13] Assisted reproduction is subject to federal legislation.[17] The AHRA provides that reproductive material or an embryo may only be used with consent of the donor who provided the reproductive material or embryo and may only be used for purposes to which the donor consented.[18] The donor's consent must be in writing and the donor's signature must be witnessed.[19] The donor may consent to the use of reproductive materials or an embryo for one or more of the following purposes:[20]

- the donor's own reproductive use,
- following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,[21]

---

[17] Although the status of the AHRA was questioned in the Supreme Court, the majority of the Court found that the provisions on consent to the use of human reproductive material and embryos were constitutional: *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 64.

[18] AHRA s 3 defines "donor" as:

> (a) in relation to human reproductive material, the individual from whose body it was obtained, whether for consideration or not; and
>
> (b) in relation to an *in vitro* embryo, a donor as defined in the regulations

As regards an embryo, "donor" means "the couple who are spouses or common-law partners at the time the *in vitro* embryo is created, regardless of the source of the human reproductive material used to create the embryo" or "the individual who has no spouse or common-law partner at the time the *in vitro* embryo is created, regardless of the source of the human reproductive material": *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, s 10 [AHR Regulations].

[19] AHR Regulations, s 1(3). See also AHRA s 8.

[20] AHR Regulations, ss 2-5, 10-15.

[21] Reproductive use by the donor's spouse or partner is not expressly set out in the consent provisions governing the use of embryos. However, with respect to embryos, the spouse or partner is also considered to be a "donor": AHR Regulations, s 10. Accordingly, use after death by the surviving spouse or partner is covered as the donor's own reproductive use, at least where both contributed reproductive material.

Where the embryo was created using reproductive material from one spouse or partner only, it is not clear whether the surviving spouse or partner can still use the embryo. AHR Regulations, s 10(3) limits the definition of "donor" to the person who provided the reproductive material if that person ceases to be a spouse or partner before the embryo is used. Although death ends a marriage or partnership, blocking the surviving spouse or partner's ability to use the embryo seems contrary to many other provisions in the AHR Regulations. Such a result would also have a disproportionate effect on same sex couples as only one spouse or partner can stand as donor. If the donor's reproductive material can be used by the surviving spouse or partner to create an embryo after the donor's death, it makes no sense to block the survivor's use of an

Continued

- the reproductive use of a third party,
- improving assisted reproduction procedures, or
- providing instruction in assisted reproduction procedures.

If the donor wishes to withdraw consent, he or she must do so in writing.[22] Withdrawing consent is only effective if received by the person intending to use the reproductive material or embryo before such use is made. In the context of reproductive use following the donor's death, it follows that consent must be withdrawn during the donor's lifetime.

[14] The AHRA also contains safeguards to prohibit reproductive material being removed after death without the donor's consent:

> **Posthumous use without consent**
>
> **8(2)** No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.

The AHR Regulations contain parallel provisions that require the donor's consent during life to the removal of reproductive material after death and to the purposes for which it may be used.[23]

[15] From this review, it is clear that the AHRA and AHR Regulations expressly contemplate that stored reproductive material or embryos may be used for reproductive purposes after the donor's death. In contrast to activities prohibited by the AHRA (e.g. human cloning, paid surrogacy and most sex selection procedures[24]), the use of reproductive material or an embryo after the donor's death is expressly allowed provided the donor has consented. Nor does the AHRA place a time limit on the storage of reproductive material or embryos as is done in some other countries.[25] As a result, a child may be born well outside the law's traditional provision for a child *en ventre sa mère*.

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embryo created before the donor's death. This report assumes that the AHR Regulations did not intend this anomalous result.

[22] AHR Regulations, ss 2-5, 10-15.

[23] AHR Regulations, ss 6-9.

[24] AHRA, ss 5-6.

[25] Placing a time limit on storage of reproductive material or embryos might be *ultra vires* the federal law making power. However, there is no such limitation imposed by provincial law in Alberta either.

Jurisdictions that impose a 10 year time limit on storage, with extension by application, include:

Continued

E. Interaction with Provincial Law

[16] While the AHRA allows for assisted reproduction after death, the AHRA does not provide for parentage. Assigning parentage falls within provincial jurisdiction.

[17] As will be discussed in Chapter 2, the FLA favours parentage established through genetic relationships when assisted reproduction is used.[26] Where a donor has consented to the use of reproductive material or embryos for his or her own reproductive use and also consented to reproductive use by his or her spouse or partner after death, the framework in the FLA for assigning parentage recognises the donor as the child's genetic parent. However, both the FLA and the *Vital Statistics Act* impose barriers to registering a deceased parent on a birth registration or birth certificate.[27] While there is provision for a court declaration of parentage where assisted reproduction is used or where a parent is deceased, the FLA again raises procedural hurdles by limiting the provision to a child *en ventre sa mère*. In addition to the difficulties in recognising the deceased genetic parent, in most cases the FLA also fails to recognise the deceased's surviving spouse or partner as the intending parent. These outcomes stand in contrast to the FLA's overall intent to recognise genetic relationships and relationships based on consent to parent.

[18] Given the importance of establishing parentage, this report recommends that the FLA should be amended to allow the court to make a declaration of parentage for an after-born child born through assisted reproduction after a parent's death. Where a child is born using assisted reproduction after the death of a genetic parent, the surviving spouse or partner of the genetic parent should have standing to apply for a declaration to recognise the genetic parent. Where the court issues a declaration in favour of the genetic parent, the FLA should also recognise the surviving spouse or partner as the intending parent.

- United Kingdom: *Human Fertilisation and Embryology Act 2008* (UK), c 22, s 15 [UK Act]. (Maximum extension to 55 years)
- New Zealand: *Human Assisted Reproductive Technology Act 2004* (NZ), 2004/92, s 10.
- Western Australia: *Human Reproductive Technology Act 1991* (WA), s 24.
- New South Wales: *Assisted Reproductive Technology Act 2007* (NSW), s 25.
- Victoria: *Assisted Reproductive Treatment Act 2008* (Vic), s 31.

In contrast, Swiss law requires reproductive material and embryos to be destroyed after five years: *Federal Act on Medically Assisted Reproduction (Reproductive Medicine Act)* 1998, SR 810.11, Art 15.

[26] FLA, s 8.1.

[27] *Vital Statistics Act*, SA 2007, c V-4.1.

[19] Following the discussion of parentage, Chapter 3 considers the consequences of attributing parentage of after-born children to a deceased person in the following areas:

- *Vital Statistics Act*
- *Citizenship Act*
- *Wills and Succession Act*
- *Perpetuities Act*
- Statutory survivor benefits under the
  - *Canada Pension Plan Act*
  - *Workers' Compensation Act*
  - *Fatal Accidents Act*
- *Insurance Act*

[20] The discussion in Chapter 3 reflects the fundamental principle that a person only has enforceable rights once born alive. In most areas considered in Chapter 3, the legislation clearly applies to children alive at the time of the deceased's death. An after-born child would not fall within those parameters. While this result may be viewed as prejudicial to the after-born child, there is no compelling policy reason to change this result. For the law to provide any meaningful remedy for the possibility of an after-born child would require reserving part of the deceased parent's estate for such an eventuality. To do so would also limit the rights of living persons in favour of those with no legal existence.

CHAPTER 2

Parentage for After-born Children

A. Importance of Establishing Parentage

[21] Parentage is most often considered in the context of personal and social relationships. In the legal context, parentage establishes both status and responsibilities. Generally speaking, status such as family identity and citizenship endure beyond the death of a parent. Status also typically endures into the child's adulthood. In comparison, responsibilities such as providing the necessities of life and medical care only endure during the child's minority and only during the life of the parent. However, some responsibilities such as financial support for a minor child may endure past a parent's death.[28] In contrast to status, responsibilities owed by a parent to a child taper off as the child becomes an adult.

[22] The United Nations and member states have agreed that determining and acknowledging parentage is of fundamental importance to a child's identity. The *United Nations Convention on the Rights of the Child* provides:[29]

> **Article 7:1**
> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
>
> **Article 8:1**
> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

These basic elements of family identity have sometimes been denied to after-born children. For example, the mother of two after-born children in Britain unsuccessfully brought a court case for the right to have her children's paternity acknowledged on their birth certificate.[30] Alberta's FLA and vital statistics

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[28] WSA, s 88.

[29] *Convention on the Rights of the Child*, GA Res 44/25, UNGAOR, 1989, Supp No 49, UN Doc A/44/49, (1989) at Article 2, s 1. Canada ratified the *Convention* on December 13, 1991.

[30] *R v Human Fertilisation and Embryology Authority Ex parte Blood*, [1997] 2 WLR 806.

legislation raise similar obstacles for recognising and recording parentage for after-born children.

B. *Family Law Act*

[23] The importance of establishing parentage is reflected in the framework of the FLA.[31] The FLA provides:

> **Rules of parentage**
>
> **7(1)** For all purposes of the law of Alberta, a person is the child of his or her parents.
>
> **(2)** The following persons are the parents of a child:
>
> (a) unless clause (b) or (c) applies, his or her birth mother and biological father;
>
> (b) if the child was born as a result of assisted reproduction, a person identified under section 8.1 to be a parent of the child;
>
> (c) a person specified as a parent of the child in an adoption order made or recognized under the *Child, Youth and Family Enhancement Act*.

Section 7(2)(a) and (b) will generally identify a genetic parent as a legal parent. Parentage through a genetic link or by consent underpins the FLA provisions. Section 7(3) identifies those who are parents by consent.

[24] The genetic basis for parentage is clear in section 7(2)(a) which applies to unassisted reproduction. The genetic basis for parentage also prevails in assisted reproduction. Where assisted reproduction is used, section 7(2)(b) draws in the three possible scenarios in section 8.1:

- reproductive material or an embryo provided by both a male and female person
- reproductive material or an embryo provided by a male person only
- reproductive material or an embryo provided by a female person only

In the first scenario, section 8.1 identifies the genetic parents who provided the reproductive material or embryo as the legal parents. In the remaining scenarios,

[31] The parentage provisions from Part 1 of the FLA are set out in Appendix A.

section 8.1 identifies the genetic parent who provided the reproductive material or embryo. Section 8.1 also identifies the intending parent based on that person's relationship to the genetic parent (i.e. spouse or partner) and their consent to parent the resulting child. Although section 8.1 presumes consent by the intending parent, the presumption is rebuttable.

[25] Where assisted reproduction does not involve a surrogate, section 8.1 identifies parentage directly. Where assisted reproduction requires a surrogate, there must first be a declaration under section 8.2 that the surrogate is not the parent. Such a declaration can only be made with the surrogate's consent or waiver of her consent if she cannot be located or is deceased. A declaration that the surrogate is not a parent consequently declares that the genetic parent is a parent. Once there is a declaration in favour of the genetic parent, the court can apply the presumptions in section 8.1 to identify the child's other parent.

[26] In summary, Part 1 of the FLA is structured to identify a child's parents as those persons with a genetic link to the child and those persons who consented to be the child's parents.[32] In addition, the FLA contains safeguards to prevent a person who has no genetic link to the child or who did not consent to be a parent (e.g. a surrogate and her spouse or partner) from being identified as a parent.[33] Even if there is a genetic link to the child, a person who was a mere donor of reproductive material or an embryo is protected from being found to be a parent.[34]

[27] Where assisted reproduction is used after death, the FLA still tracks the genetic basis for parentage. However, as the genetic parent is deceased, the presumptions and procedures set out in the FLA can be problematic. As section 8.1 identifies the intending parent based on their relationship to the deceased genetic parent, there may also be problems in recognising the intending parent where his or her relationship to the genetic parent was ended by death. The

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[32] While the total number of persons who have either a genetic link to the child or who consented to be parents may sometimes exceed two, the FLA limits the number of parents to two: FLA ss 8.2, 9.

[33] The FLA prevents the surrogate's spouse or partner from being a parent. Section 7 provides:

> **Rules of parentage**
>
> **7(5)** A person who was married to or in a conjugal relationship of interdependence of some permanence with a surrogate at the time of the child's conception is not a parent of the child born as a result of the assisted reproduction.

[34] The FLA provides:

> **Rules of parentage**
>
> **7(4)** A person who donates human reproductive material or an embryo for use in assisted reproduction without the intention of using the material or embryo for his or her own reproductive use is not, by reason only of the donation, a parent of the child born as a result.

discussion below explores how the FLA applies in specific scenarios involving assisted reproduction after death.

1. ASSISTED REPRODUCTION AFTER DEATH WITHOUT SURROGACY

a. Status of deceased genetic parent

[28] The most likely scenario to arise is where the genetic father dies leaving sperm or embryos and his surviving wife or female partner is the birth mother. In this scenario, the FLA identifies the genetic father as a parent either under section 8.1(2) (reproductive material or embryo provided by male person only) or section 8.1(4) (reproductive material or embryo provided by male person and female person).

[29] Although the FLA identifies the genetic father as a parent, his name cannot be recorded on the birth registration. The *Vital Statistics Information Regulation* requires that a parent be present to sign the registration document.[35] Thus, if the genetic father is deceased, only the birth mother can be registered as the child's parent. Although the FLA provides for having a deceased person declared to be a parent and the birth registration subsequently amended, this provision only applies for a child *en ventre sa mère* and not for after-born children.[36] As the genetic father cannot be registered as a parent, the child cannot be registered with the father's last name if the birth mother has her own name. In summary, even though the FLA points to the genetic father as a parent under section 8.1 and the court can accept DNA evidence of parentage under section 15, both the FLA and the *Vital Statistics Information Regulation* impose procedural barriers to registering the genetic father as a parent.

[30] A less common scenario to arise is where the genetic mother dies leaving eggs or embryos and her surviving wife or female partner is the birth mother. In this scenario, the FLA fails to identify the genetic mother as a parent. Unlike the parallel provision in section 8.1(2) that assigns parentage to the birth mother and the male person who provided the reproductive material or embryo, section 8.1(3) assigns parentage to the birth mother's spouse or partner. As a result section 8.1(3) will not identify the deceased genetic mother as a parent as her

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[35] *Vital Statistics Information Regulation*, Alta Reg 3/2012, s 2.

[36] *Vital Statistics Act*, SA 2007, c V-4.1, s 11; FLA s 9(4) provides:

> **Declaration of parentage**
>
> **9(4)** If the court finds that a deceased person is or is not a parent of a child conceived before that person's death, the court may make a declaration to that effect.

relationship with the birth mother ended on death. Even if the FLA did recognise both the birth mother and the genetic mother, the problem of registering the deceased genetic mother would still arise as the provision is limited to a child *en ventre sa mère*.

b. Status of intending parent

[31] Where assisted reproduction occurs after the death of a genetic parent but without recourse to a surrogate, the FLA works well to identify the intending parent by her status as birth mother. As birth mother she can also be registered as a parent under vital statistics legislation and has the requisite standing to bring applications under the FLA if needed.

2. ASSISTED REPRODUCTION AFTER DEATH WITH SURROGACY

a. Status of deceased genetic parent

[32] Where surrogacy is required, the FLA generally identifies the deceased genetic parent as a parent. This result is subject to the surrogate consenting to a declaration under section 8.2 in favour of the genetic parent. The court's jurisdiction to issue a declaration under section 8.2 is limited to children born in Alberta. Section 8.2 represents a deliberate and careful policy choice in balancing the interests of surrogates and genetic parents. Where the surrogate consents, the person who provided the reproductive material or embryo that led to the child's birth will be declared to be a parent. That declaration is also the basis for amending the birth registration under the *Vital Statistics Information Regulation*.[37] Thus, in contrast to situations without surrogacy, it appears to be easier to register a deceased genetic parent when surrogacy is required. Where surrogacy is required, a declaration under FLA section 8.2 rests on the fact of the genetic link between the parent and child. Without surrogacy, a declaration under FLA section 9 is limited to a child *en ventre sa mère*.

b. Status of intending parent

[33] Where a declaration is issued under section 8.2 in favour of the genetic parent, the child's other parent is identified by the presumptions in section 8.1. However, except for cases that fall under section 8.1(4) (reproductive material or embryo provided by both male person and female person), the presumptions in

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[37] *Vital Statistics Information Regulation*, Alta Reg 3/2012, s 5.

section 8.1 are based on the intending parent being the spouse or partner of the genetic parent at the time the child was conceived. This approach is problematic where assisted reproduction occurs after death.

[34] The AHR Regulations provide that a donor may consent to the use of reproductive materials or embryos for reproductive purposes by the person who is the *donor's spouse or partner at the time of the donor's death*. However, the FLA refers to a person who was the *donor's spouse or partner at the time of conception*, i.e. when the reproductive material or embryo was implanted. As marriage and interdependent partnerships both end on death, the FLA creates a gap that does not exist under the federal legislation. Thus, even though the intending parent has consent to use the deceased genetic parent's reproductive material or embryos under the AHR Regulations and has consented to be a parent under the FLA, the intending parent does not meet the FLA requirement of being a spouse or partner at the time of conception. This result also appears to be contrary to the provision in FLA section 7(6) which abolishes all distinctions between the status of a child born inside marriage and a child born outside marriage. Though initially targeted at illegitimacy, in the modern age it is not clear why the law would raise arbitrary distinctions against children whose parents' marriage ended by death.

[35] In addition to falling outside the presumptions in section 8.1, the intending parent does not have standing to bring an application for a declaration of parentage under section 8.2. Section 8.2 does not provide for an intending parent to bring an application where the genetic parent is deceased. Nor does section 8.2 allow the intending parent to apply for a waiver of consent if the surrogate cannot be located or is deceased. The intending parent could resort to a declaration under section 9 as a person claiming to be a parent or as a person with care and control of the child.[38] However, section 8.2 offers a carefully crafted consent application process that is in keeping with balancing the interests that arise in a surrogacy arrangement. In contrast, section 9 is potentially adversarial in nature. While an adversarial process might be appropriate in some circumstances, it is not conducive to determining parentage in the consent-driven context of surrogacy.

[38] As with FLA s 8.2, the court has jurisdiction under FLA s 9 with respect to children born in Alberta. In addition, the court has jurisdiction under FLA s 9 if an alleged parent resides in Alberta.

C. Law Reform Recommendations

[36] Law reform agencies in Canada and the United States have recommended that laws be changed to provide for parentage for the after-born child. In 1985, the Ontario Law Reform Commission argued that legislation should be enacted to establish parentage. The Commission's view was that it was the child who suffered in such circumstances. It recommended that a mother should be able to register the child's genetic father where the child was conceived using sperm from the mother's deceased husband or partner.[39]

[37] In 2009, the ULCC and the Federal Provincial/Territorial Coordinating Committee of Senior Officials on Family Justice issued a report on parentage in the context of assisted reproduction. The report recommended that legislation should allow parentage of after-born children to be established when the deceased parent clearly consented to the use of his or her reproductive material after death and also, that any after-born children were to be treated as offspring.[40] The resulting *Uniform Child Status Act (2010)* provides for parentage for after-born children by means of a court declaration.[41]

> **Declaratory order respecting parentage – posthumous conception**
>
> **7(1)** The following persons may apply to the court for a declaratory order that a deceased person is a parent of a posthumously conceived child:
>
> (a) the person who was married to or in a common-law partnership with the deceased person at the time of his or her death; or
>
> (b) the person who is claiming to be the posthumously conceived child of the deceased person.
>
> **(2)** A person referred to in clause (1)(a) may apply for a declaratory order that he or she and a deceased person are the parents of a posthumously conceived child born to a surrogate.
>
> **(3)** The court may grant the order sought under subsection (1) if it is satisfied that

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[39] Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, v 2 (1985) at 180, online: Internet Archive <www.archive.org/details/reportonhumanart02onta>.

[40] ULCC Report at paras 65-71.

[41] Uniform Law Conference of Canada, *Uniform Child Status Act (2010)*, s 7, online: Uniform Law Conference of Canada <www.ulcc.ca/images/stories/2010_pdf_en/2010ulcc0021.pdf>.

(a) the human reproductive material of the deceased person or an embryo created with the human reproductive material of the deceased person was used in the assisted reproduction, and

(b) prior to his or her death, the deceased person consented in writing to be recognized as a parent of a child conceived posthumously and did not withdraw that consent in writing.

(4) The court may grant the order sought under subsection (2) if it is satisfied that

(a) the human reproductive material of the deceased person or an embryo created with the human reproductive material of the deceased person was used in the assisted reproduction,

(b) prior to his or her death, the deceased person consented in writing to be recognized as a parent of a child conceived posthumously and did not withdraw that consent in writing,

(c) the applicant consented to be a parent of a child born as a result of the assisted reproduction and did not withdraw that consent prior to the child's conception, and

(d) after the birth of the child, the surrogate consented in the prescribed form

(i) to relinquish her entitlement to be a parent of the child, and

(ii) to the application.

[38] In 2010, British Columbia issued a White Paper outlining proposed changes to family law legislation, including parentage for after-born children. As provided in the ULCC *Uniform Child Status Act*, a deceased person who provided human reproductive material and gave written consent to be a parent of an after-born child would be presumed to be the child's parent.[42] This proposal has been adopted in the British Columbia *Family Law Act*.[43]

[39] In the United States, the *Uniform Parentage Act* provides:[44]

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[42] British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (July 2010) at 33, online: JusticeBC <www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf>.

[43] *Family Law Act*, SBC 2011, c 25, s 28.

[44] Uniform Law Commission, *Uniform Parentage Act* §707 (2002), online: Uniform Law Commission <www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf>.

> **Section 707. Parental Status of Deceased Individual**
>
> If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

The American Bar Association's model act on assisted reproductive technologies tracks the parentage provisions of the *Uniform Parentage Act*:[45]

> **Section 607. Parental Status of Deceased Individual**
>
> Except as otherwise provided in the enacting jurisdiction's probate code, if an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

D. The Law in Other Common Law Jurisdictions

[40] The British Columbia *Family Law Act* contains new provisions establishing parentage for the after-born child and is the first of its kind in Canada:[46]

> **Parentage if assisted reproduction after death**
>
> **28(1)** This section applies if
>
> (a) a child is conceived through assisted reproduction,
>
> (b) the person who provided the human reproductive material or embryo used in the child's conception
>
> (i) did so for that person's own reproductive use, and
>
> (ii) died before the child's conception, and
>
> (c) there is proof that the person

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[45] American Bar Association, *American Bar Association Model Act Governing Assisted Reproductive Technology* (February 2008) at § 607, online: American Bar Association <www.apps.americanbar.org/family/committees/artmodelact.pdf >; re "tracking", see Raymond C O'Brien, "The Momentum of Posthumous Conception: A Model Act" (2009) 25:2 J Contemp Health L & Pol'y 332 at 334-334.

[46] *Family Law Act*, SBC 2011, c 25.

> (i) gave written consent to the use of the human reproductive material or embryo, after that person's death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died,
>
> (ii) gave written consent to be the parent of a child conceived after the person's death, and
>
> (iii) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death.
>
> **(2)** On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are
>
> (a) the deceased person, and
>
> (b) regardless of whether he or she also provided human reproductive material or the embryo used for the assisted reproduction, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.

The Act requires that the parents were spouses or partners at the time of the death. The deceased parent must have given written consent to the use of the human reproductive material or embryo after death and written consent to be a parent of an after-born child.

[41] In the United States, the *Uniform Parentage Act* has been adopted in eight states.[47]

[42] In the United Kingdom, after-born children have the right to have their parentage registered. The *Human Fertilisation and Embryology Act 2008* allows the deceased genetic father to be registered as the father at a registry of births if consent has been given; consent must have been given in writing for the use of sperm or an embryo after death. [48] In addition, the Act has provisions for a woman in a relationship with another woman to be registered as the other parent of an after-born child.[49] Similar provisions apply in the Australian state of Victoria.[50]

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[47] Uniform Law Commission, *Uniform Parentage Act*, §707 (2002), online: Uniform Law Commission <www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf>.

[48] *Human Fertilisation and Embryology Act 2008* (UK) c 22, ss 39-41.

[49] *Human Fertilisation and Embryology Act 2008* (UK) c 22, ss 46-47.

[50] *Status of Children Act 1974* (Vic), ss 37-40.

E. Recognising Parentage for After-born Children

1. RECOGNISING THE DECEASED GENETIC PARENT

[43] Should the law be changed to provide for legal parentage for the after-born child? In ALRI's view, there is no principled reason to deny the after-born child the right to legal parentage in respect of the deceased parent.

[44] Differences between after-born children and their siblings born during the parent's lifetime are likely to be unconstitutional under the *Charter*.[51] A parallel can be drawn to the position of children considered to be illegitimate. Treating children differently based on the circumstances of their birth was ruled to be unconstitutional as discrimination "based on personal characteristics associated with the group to which the child belongs."[52]

[45] In order to establish parentage, it is generally agreed that the deceased parent must have given consent. Law reform recommendations have made consent a requirement.[53] Similarly, a number of academic commentators view consent as essential.[54] However, the nature and form of consent is subject to debate. Is it sufficient that the deceased consent to the use of his or her reproductive material after death? or is further consent to be a parent required?

[46] The Canadian models that recognise after-born children effectively require both consent to after-death use and to be a parent. The federal AHRA and AHR Regulations require the deceased's consent to after death use of his or her reproductive material or embryos for reproductive purposes.[55] At the provincial level British Columbia imposes the additional requirement that the deceased must also have consented to be a parent. The *Uniform Child Status Act*

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[51] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; re constitutionality, see ULCC Report at para 14.

[52] See generally Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances*, Final Report 98 (2010) at 192-194.

[53] See e.g. ULCC Report at paras 65-71; British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (July 2010) at 33, online: Justice BC <http://www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf>; Uniform Probate Code (1969), online: Uniform Law Commission, <www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf>, § 2-120 (f).

[54] See e.g. Charles P Kindregan, Jr, "Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons" (2011) vol 7 J of Health & Biomedical L 147 at 151; Susan N Gary, "We are Family: The Definition of Parent and Child for Succession Purposes" (2008) 34:3 ACTEC J 171 at 182; Barry Dunn, "Created After Death: Kentucky Law and Posthumously Conceived Children", Note, (2009) 48:1 U Louisville L Rev 167 at 184.

[55] AHR Regulations, ss 3, 4.

(2010) would impose the same requirement if adopted by other provinces or territories.[56] However, the background reports to these acts do not provide a clear policy basis for requiring additional consent to parent.

[47] In ALRI's opinion, imposing the further requirement of consent to parent is redundant and would be another means of distinction against after-born children. Under the FLA, parentage is established either through a genetic relationship or through consent to parent where there is no genetic relationship. Where a child is conceived and born during a genetic parent's lifetime no further consent to parent is imposed. Similarly, there is no consent to parent requirement for a child *en ventre sa mère*. The ULCC Report and the background materials for the British Columbia legislation do not set out a clear policy basis for requiring additional consent to parent. Requiring additional consent to parent would not be in keeping with the framework of the FLA which provides for parentage based on the genetic relationship regardless of whether the child was conceived through assisted reproduction.

[48] In order for assisted reproduction to occur after the death of the donor, consent must have been obtained under the AHRA and AHR Regulations. The federal requirements are sufficiently stringent and clear to support a finding of parentage. The AHR Regulations require that the genetic parent consent in writing, with a witnessed signature, to allow the use of his or her reproductive material or embryos for reproductive purposes by his or her surviving spouse or partner. Given these requirements, it is unavoidable that the genetic parent has considered the prospect of an after-born child in the context of his or her family. A further safeguard against unwanted parentage is provided in the ability to revoke consent at any point while the genetic parent is still alive. However, where consent to use reproductive material or embryos after death has not been withdrawn, it is appropriate to conclude that the deceased was a parent based on the genetic relationship.

[49] ALRI stresses that this is an area that involves both federal and provincial legislation. The circumstances that provide for the conception of a child through assisted reproduction after the death of a genetic parent are set out in federal legislation. Assuming that the federal requirements are satisfied where assisted reproduction occurs after death, that level of consent should be sufficient for provincial purposes. It can be argued, however, that attaching provincial civil

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[56] Uniform Law Conference of Canada, *Uniform Child Status Act (2010)*, s 7, online: Uniform Law Conference of Canada <www.ulcc.ca/images/stories/2010_pdf_en/2010ulcc0021.pdf>.

law consequences to compliance with federal criminal legislation is not ideal law-making. Nor is the opposite scenario. In other words, denying parentage to an after-born child where there was a violation of federal criminal legislation is a questionable result, particularly as neither the child nor deceased parent was alive when the federal legislation was violated. Accordingly, there should be a provincial requirement for consent to the reproductive use after death of a person's reproductive material or embryos by his or her surviving spouse or partner in order to recognise a deceased person as a genetic parent of an after-born child. Including a provincial consent requirement is also important where the assisted reproduction procedure takes place outside of Canada. Foreign jurisdictions may not have consent requirements equivalent to those under the AHRA and Regulations. Indeed, foreign jurisdictions may be attractive specifically because they offer procedures that are prohibited in Canada, such as sex selection, paid surrogacy or after death use without consent.

[50] Where assisted reproduction is undertaken with consent after the death of a genetic parent, the genetic parent should have the same basis for parentage as if the child had been conceived during his or her lifetime.

[51] In the event that surrogacy is required, the genetic parent's status will depend on whether the surrogate consents to give priority to the genetic parent. As noted previously, the FLA section 8.2 represents a careful balancing of the interests of surrogates, genetic parents, and intending parents. There is no compelling reason to alter the priority accorded to the rights of a woman who acts as a surrogate where assisted reproduction is used after death.

RECOMMENDATION 1

Where a person provides reproductive material or an embryo and consents to its use for reproductive purposes after his or her death by a surviving spouse or partner, the court may, on application, declare that person to be a parent of a child conceived after that person's death on the same basis as if the child had been conceived through assisted reproduction during the person's lifetime.

[52] However, in order to maintain the same level of court access to determine parentage where surrogacy is required, the deceased genetic parent's surviving spouse or partner should have standing to apply for a declaration under section 8.2. Allowing the surviving spouse or parent to apply for a declaration in favour of the genetic parent will mean that there are always two parties who can bring the application under the consent process set out in section 8.2. Allowing the

surviving spouse or partner to apply under section 8.2 would also allow the court to waive the surrogate's consent where she cannot be found or has died. In contrast to the potentially adversarial process in section 9, the consent process in section 8.2 is tailored to situations involving surrogacy and is designed to resolve a child's parentage without delay.

RECOMMENDATION 2

Where a person provides reproductive material or an embryo and consents to its use for reproductive purposes after his or her death by a surviving spouse or partner, the surviving spouse or partner should have standing to apply for a declaration of the deceased's parentage where a child is conceived using the deceased's reproductive material or embryo and the child's birth mother is a surrogate.

2. RECOGNISING THE INTENDING PARENT

[53] In the context of assisted reproduction after death, it will be the intending parent who initiates the assisted reproduction procedure that leads to the birth of an after-born child. The intending parent will also be the person who provides for and raises the child provided that his or her parentage is recognised. However, as noted above, while the FLA recognises an intending parent who has a genetic link to the child or who is the child's birth mother, those who do not fall into these categories may face problems in being recognised as parents. The most common form of assisted reproduction after death is assumed to occur where the genetic father dies leaving sperm or embryos that are then used by his surviving wife or female partner to bear a child; the FLA recognises the intending parent in such cases. However, in cases where the genetic mother has died or other instances where surrogacy is required, the FLA is problematic. On the basis of avoiding discrimination among children based on the circumstances of their birth and to close the gap between federal and provincial legislation, ALRI recommends that the FLA should also recognise the genetic parent's surviving spouse or partner as an intending parent. Where assisted reproduction is used after the death of a genetic parent, the person who was the genetic parent's spouse or partner at the time of his or her death, should be recognised as a parent on the same basis as a person who was the spouse or partner of a genetic parent when a child is conceived during the genetic parent's life.

RECOMMENDATION 3

Where a person provides reproductive material or embryos and consents to its use for reproductive purposes after his or her death by a surviving spouse or partner, the surviving spouse or partner should be recognized as a parent on the same basis as if the child had been conceived through assisted reproduction during the deceased's lifetime.

3. IMPLEMENTATION

[54] Giving effect to the recommendations proposed above is a relatively straightforward matter of drafting. Recommendation 1 may be implemented by providing for children born using assisted reproduction after the death of a genetic parent in section 8.1 of the FLA. Recommendation 1 would be reinforced by removing the reference to a child conceived before death in section 9 of the FLA. The requirement for consent to use reproductive material or an embryo after a person's death is likely best set out in the *Family Law Act General Regulation* which already provides for a surrogate's consent.[57] Recommendation 2 may be implemented by amending section 8.2 to give the surviving spouse or partner standing to apply and through consequential amendments to the notice provisions. Recommendation 3 may also be implemented through amendments to section 8.1 and is likely best achieved in connection with the amendments to implement Recommendation 1. A few other consequential amendments to the FLA would be required to tie in the recognition for deceased genetic parents and intending parents. A consequential amendment to the *Family Law Act General Regulation* would also be appropriate.

[55] It does not appear to be necessary to amend vital statistics legislation. Any instance involving assisted reproduction will require recourse to the FLA to determine parentage either by an affidavit supporting the presumptions under section 8.1 or a court declaration of parentage. If one parent is deceased, recourse to the FLA is also required to establish parentage by court declaration. Circumstances where assisted reproduction is used after the death of a genetic parent raise sensitive issues that will typically be beyond the ability of hospital or registry office staff to assess. A court process is appropriate to determine the interests in such cases. Access to a court process will also allow the court to ensure that the best interests of the child are considered under the *parens patriae* jurisdiction. In keeping with the *United Nations Convention on the Rights of the*

[57] *Family Law Act General Regulation*, Alta Reg 148/2005.

Child, recognising parentage will usually be in a child's best interests. In those rare circumstances where it is not, the court may intervene.

[56] For purposes of illustration, sample amendments to the *Family Law Act* and Regulations are set out in Appendix B.

CHAPTER 3

Implications of Identifying a Deceased Person as a Parent

A. Introduction

[57] This chapter considers the implications that flow from identifying a deceased person as the parent of an after-born child. As provided in the FLA:

> **Rules of parentage**
>
> **7(1)** For all purposes of the law of Alberta, a person is the child of his or her parents.

What are the implications for purposes of succession law and entitlement to statutory or contractual benefits for survivors? Should changes be made to limit an after-born child's ability to claim as an heir or survivor? Or are changes required to allow an after-born child to claim as an heir or survivor?

[58] The general conclusion in this chapter is that amending the FLA to identify a deceased person as a parent will have little implication for other areas of the law. The law does not make provision for property rights or compensation until a person has legal existence. In other words, an after-born child has no ability to claim property or compensation until he or she is born alive. In the context of making a claim against a parent's estate or for benefits resulting from the parent's death, the relevant time is when the parent dies. However, when the parent dies the after-born child has no legal existence. While the law may appear to operate harshly in denying inheritance or benefits to after-born children, changing the law would be detrimental to the rights of persons who are living when the parent dies. In those circumstances, where a person wants to provide financially for the possibility of an after-born child, the law allows this to be done by a carefully drafted will.

B. *Vital Statistics Act*

[59] Under Alberta legislation, a child's last name must reflect the last name of one or both of the child's parents. The *Vital Statistics Act* provides:[58]

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[58] *Vital Statistics Act*, SA 2007, c V-4.1.

Name of child

8(5) The last name of a child must be registered as follows:

(a) if the parents agree, showing:

(i) the last name of one of the parents, or

(ii) the parents' last names hyphenated or combined;

(b) if the parents do not agree on the last name or names to be used for the child, showing the last names of the parents in alphabetical order and hyphenated;

(c) if only one parent is listed on the birth registration document, showing that parent's last name.

At present, the birth registration for an after-born child will only show one parent's last name. As discussed in Chapter 2, the deceased genetic parent cannot be recorded on the birth registration. Consequently, the child cannot be registered with the deceased's last name or a combination of the parents' last names.

[60] If Alberta law were amended to identify a deceased person as the genetic parent of an after-born child, the result would be that the child could be registered with the deceased parent's last name. Carrying on a last name is often an important element of family identity and connection. It would also allow an after-born child to carry the same last name as his or her siblings.

[61] Under the amendments suggested in Chapter 2, an after-born child could not be registered with the deceased parent's last name from birth. A court process would be required to declare the child's parentage. Whether to apply for a declaration is a decision that involves the surviving parent. If a declaration is made, the surviving parent will be the sole decision-maker over what name to give the child. The *Vital Statistics Act* and regulations already provide for amending a birth registration document and replacing birth certificates after a court declaration.[59]

[62] The implication of allowing a deceased person to be registered as a genetic parent of an after-born child is that the surviving parent could decide to register the child with the deceased's last name. ALRI considers that this is an appropriate result. On an anecdotal basis, we have heard that the inability to

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[59] *Vital Statistics Act*, SA 2007, c V-4.1, ss 10 and 14; *Vital Statistics Act Ministerial Regulation*, Alta Reg 12/2012, s 6.

pass on the deceased's last name is a shared frustration for families with after-born children. Allowing the surviving parent to choose the deceased's last name for the child will address this problem. No further legal change is needed to achieve this result.

C. *Citizenship Act*

[63] Canadian citizenship is determined through federal legislation and is outside the scope of provincial jurisdiction.

[64] Generally speaking, a child who is born in Canada is entitled to Canadian citizenship.[60] Method of conception and the citizenship status of the child's parents do not come into issue for a child born in Canada.

[65] Where a child is born outside Canada, entitlement to Canadian citizenship is based on descent. The *Citizenship Act* requires that a parent be a Canadian citizen *at the time of the child's birth.*[61] As such, an after-born child cannot claim citizenship through a deceased genetic parent. An after-born child would only be entitled to citizenship by descent if the child has a genetic link to a living parent who is a Canadian citizen. There will be situations where an after-born child has no genetic link to the intending parent or where the intending parent is not a Canadian citizen. However, such circumstances also arise where a child is born overseas during a parent's lifetime.[62]

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[60] *Citizenship Act*, RSC 1985, c C-29, s 3. There is an exception for children born in Canada to foreign diplomats.

[61] *Citizenship Act*, RSC 1985, c C-29, s 3.

[62] For further discussion on citizenship by descent for children born outside of Canada using assisted reproductive technology see Canada, Citizenship and Immigration, *Operational Bulletin 381* (March 8, 2012), online: <www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob381.asp>.

D. *Wills and Succession Act*

1. FAMILY MAINTENANCE AND SUPPORT

a. Law in Alberta

[66] If a person fails to make adequate provision from his or her estate for the maintenance and support of a family member, the family member may bring an application under Part 5 of the WSA.[63] The WSA section 88 provides:

> **Order for maintenance and support of family member**
>
> **88(1)** If a person
>
> (a) dies testate without making adequate provision in the person's will for the proper maintenance and support of a family member, or
>
> (b) dies either wholly or partly intestate and the share to which a family member is entitled under a will or Part 3 or both is inadequate for the proper maintenance and support of the family member,
>
> the Court may, on application, order that any provision the Court considers adequate be made out of the deceased's estate for the proper maintenance and support of the family member.

Eligibility for maintenance and support hinges on status as a "family member" as defined in WSA section 72:

> **Definitions**
>
> **72** In this Part,...
>
> (b) "family member" means, in respect of a deceased,
>
> (i) a spouse of the deceased,
>
> (ii) the adult interdependent partner of the deceased,
>
> (iii) a child of the deceased who is under the age of 18 years at the time of the deceased's death, including a child who is in the womb at that time and is later born alive,

[63] During life the FLA imposes a requirement on a genetic parent to support a child. However, the FLA applies to a "person". A deceased parent is no longer a person under the law. A parent's support obligations after death are covered by WSA.

(iv) a child of the deceased who is at least 18 years of age at the time of the deceased's death and unable to earn a livelihood by reason of mental or physical disability,

(v) a child of the deceased who, at the time of the deceased's death,

(A) is at least 18 but under 22 years of age, and

(B) is unable to withdraw from his or her parents' charge because he or she is a full time student as determined in accordance with the *Family Law Act* and its regulations, and

(vi) a grandchild or great grandchild of the deceased

(A) who is under 18 years of age, and

(B) in respect of whom the deceased stood in the place of a parent

at the time of the deceased's death;

Even though the WSA determines the status of parent and child based on the FLA, eligibility to apply for maintenance and support under Part 5 of the WSA is limited.[64] Section 72 refers to children who are alive and meet certain criteria at the time of the deceased's death. Although section 72 includes a "child" in the womb as a child, there is a requirement that the child be born alive. An after-born child is not an eligible family member at the time of the deceased's death.

[67] The Alberta case of *McMaster* also stands for the proposition that family maintenance and support is only available to living persons.[65] *McMaster* involved an application for dependant's relief for the deceased's widow. The widow filed the application during her lifetime but the application was not heard until after the widow's death. Although dealing with the entitlement of a deceased person to relief, the reasoning in *McMaster* is also relevant to the entitlement of the unborn:[66]

> [S]ince the first concern of the court is the need for maintenance and support, "dependant" must in my opinion mean a living dependant,

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[64] WSA s 1 provides:

> **Interpretation**
>
> 1(3) If an individual is a parent of a child within the meaning of Part 1 of the *Family Law Act*, that individual is a parent of the child for all purposes under this Act, including for the purposes of determining, at any generation, whether the child or parent is an ascendant or descendant of another individual.

[65] *Re McMaster Estate* (1957), 10 DLR (2d) 436 (Alta SC TD).

[66] *Re McMaster Estate* (1957), 10 DLR (2d) 436 (Alta SC TD) at 441-442.

> since no need for support can exist if the dependant is not living. The controlling section of the Act – s.4 (as amended in 1955, by ch. 55, s. 5) which confers jurisdiction upon the Court, clearly indicates that the discretionary jurisdiction is conferred only for the purpose of enabling the court to make adequate provision for the maintenance and support of a dependant. If a dependant dies before such provision is made, the result is that not only the need for maintenance and support disappears, but the dependant also disappears and there is not only no need for maintenance and support (on the existence of which depends the Court's jurisdiction) but no person in whose favour any provisions could be made. As I intimated in *Re Willan, supra*, the Act, derogating as it does from the will-making power of a testator, must be construed strictly, and since there is nowhere in the Act any provision or suggestion of a provision that any right devolves upon the personal representative of a deceased dependant, no such provision should be read into the Act, and the right must be confined to those persons on whom it is clearly bestowed by the Act, *i.e.* "dependants" who in the light of the purpose and intent of the Act must be construed as living dependants.

b. Law in other jurisdictions

[68] The British Columbia legislation is not express about whether an after-born child can claim maintenance from a deceased parent's estate. However, the wording of the legislation implies that such children are not eligible. The *Wills, Estates and Succession Act* governs an application for maintenance.[67] Section 60 sets out the requirements that an applicant must meet to claim maintenance from an estate:

> **Maintenance from an estate**
>
> **60** Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.

Only a testator's spouse or children may bring an application under section 60. However, the Act does not define the term "children". Further, as the Act has only been in force since March 2014, there are not yet any cases interpreting the definition of "children" in this particular provision.

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[67] *Wills, Estates and Succession Act*, SBC 2009, c 13.

[69] Section 8.1 of the BC *Wills, Estates and Succession Act* expressly addresses an after-born child's right to inherit property. That section uses the term "descendant" when referring to an after-born child.[68] If the legislators had wanted to allow an after-born child to claim maintenance under section 60, it follows that the term "descendant" would have been used rather than the word "children". Restricting eligibility to children rather than the broader term "descendant" reflects a deliberate policy choice. Similarly, section 8.1 refers to "inherit" only and does not refer to making a claim for maintenance under section 60.

[70] Further, in order for an after-born child to inherit under section 8.1, the surviving spouse or partner must give notice to the deceased's personal representative during the same 180 day notice period for claiming maintenance under section 60. It seems that the intent is to make the personal representative aware of the potential for a future claim for inheritance from an after-born descendant which may have an impact on payments to others under section 60.

[71] In 2008, the Manitoba Law Reform Commission recommended that an after-born child should be allowed to claim dependants' relief from a deceased parent's estate.[69] The reasons for this recommendation are threefold. First, the Manitoba legislation includes a child *en ventre sa mère* in its statutory definition of the "children" who are eligible for dependants' relief. According to the Commission, excluding after-born children from the application of the Act, but including children *en ventre sa mère*, serves only to discriminate against after-born children based on the circumstances of their conception and birth. Second, excluding after-born children from claiming dependants' relief means that they may miss out on much needed support from their deceased parent. This, in turn, could mean that they become dependent on the state for support, which is a consequence that should be avoided. Finally, including after-born children in the legislation would clarify the law which, in turn, would avoid costly litigation over who qualifies as a child within the meaning of the statute. To date, the Commission's recommendations have not been adopted by the Manitoba legislature.

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[68] British Columbia uses the term "posthumously conceived child."

[69] Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants' Relief; The Intestate Succession Act Sections 1(3), 6(1), 4(5), 4(6) and 5*, Report 118 (2008) at 25.

c. Need for reform

[72] The WSA does not currently support an application for maintenance and support for an after-born child from the deceased parent's estate. The definition of family member in WSA section 72 could be extended to include after-born children. However, to do so would be contrary to the intent of WSA Part 5 and to established principles of Canadian law.

[73] The intent of Part 5 is to provide maintenance and support to family members in need following the death of a spouse, partner or parent. There is an element of urgency in bringing such application. Section 89 requires that an application be brought within six months of the grant of probate or administration of the deceased's estate. This time period will vary from the time of death but will typically be long enough to cover the birth of a child already in the womb when the deceased dies. Imposing a short time period for bringing the application ensures that the need for support and maintenance can be met quickly and that the interests of family members and those who would inherit under a will or intestacy can be promptly assessed and balanced. Adding a requirement to take into account the uncertain prospect of an after-born child would limit the availability of maintenance to other family members and the rights of those would inherit under a will or intestacy.

[74] Canadian law clearly distinguishes between persons with legal existence and enforceable rights and non-persons with no legal existence and no enforceable rights. In *R v Sullivan* the Supreme Court of Canada concluded that the terms "person" and "human being" are synonymous; an individual does not become a "person" or a "human being" until they are born alive and viable.[70] It follows that, although a natural person possesses legal rights, those rights do not accrue or become enforceable until the person is born alive. Further support for this analysis is found in the line of cases dealing with the legal rights of an unborn fetus. In *Winnipeg Child & Family Services (Northwest Area) v G(DF)*, the Supreme Court of Canada recognized, and refused to overturn, the "time-honoured rule that legal rights accrue only upon live birth."[71]

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[70] *R v Sullivan*, [1991] 1 SCR 489 at para 21.

[71] *Winnipeg Child & Family Services (Northwest Area) v G(DF)*, [1997] 3 SCR 925 at para 24. See also *Mathison v Hofer* (1984), 27 Man R (2d) 41 (QB); *Ebb and Flow First Nation v Canada (Attorney General)*, 2013 MBQB 104. In *Mathison*, the Court held that the plaintiff could not collect insurance benefits for the death of a child because her fetus was stillborn; the legal right to collect the death benefits never arose. In *Ebb and Flow*, the plaintiffs were not allowed to commence an action on behalf of the future members of their band; those members did not yet exist and, as a result, did not have the legal right to commence an action.

[75] The context of the current report does not engage the question of fetal rights but rather the legal status of stored embryos and reproductive material such as sperm and eggs. While there is considerable debate internationally on whether embryos and reproductive material are mere property or something in between property and person, Canadian law is fairly clear. The scheme of the AHRA in regulating the use of reproductive materials and embryos and prohibiting their sale reflects a property law approach. Similarly, in the Alberta case of *CC v AW* both sperm and frozen embryos were held to be property.[72] Further, as one legal author concludes: "If a fetus (which is closer in time and in development to an infant than is an embryo), is not a person then it is difficult to see how an embryo could be."[73]

[76] Neither the current intent of the WSA Part 5 nor the legal status of reproductive materials or embryos supports making provision for family maintenance and support for the possibility of an after-born child. If Alberta law were to be amended to provide for a future claim by an after-born child, the amendment would have to recognise that no application could be made unless and until the child was a living person. In order for such an application to lead to a meaningful remedy, some portion of the deceased's estate would have to be reserved for the potential maintenance and support of an after-born child. To do so through legislation would mean limiting the rights of living persons in need of family maintenance and support and subjecting them to the potential claim of those who have no legal existence. The rights of those entitled to inherit under will or intestacy would be similarly limited and subjected. ALRI concludes that there is no sound policy reason to propose such a change. Indeed, there are strong policy reasons against it.

[77] While some jurisdictions have sought to balance the rights of living persons and the possibility of after-born children by setting a time limit on when an after-born child may claim, this does not offer an appropriate solution. Limiting the time for which part of an estate may be reserved for an after-born child still limits the rights of living persons and subjects them to potential claims of those who have no legal existence. Imposing a time limit would also make arbitrary distinctions between after-born children born within the limit and those born after. Setting a time limit on the operation of a law that is contrary to

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[72] *CC v AW*, 2005 ABQB 290.

[73] Erin Nelson, *Law Policy and Reproductive Autonomy* (Hart Publishing: Oxford, 2013) at 311.

established legal policy is not appropriate unless it brings into play an equally strong but conflicting policy. There is no reason to do so here.

[78] Although an after-born child will not be entitled to family maintenance and support from the estate of the deceased parent, the child is entitled to maintenance and support from the surviving parent under the FLA. Section 72 of the WSA would also be available if the child's surviving parent failed to make adequate provision before he or she died. Section 72 also provides for the possibility of support from a grandparent or great-grandparent if they were supporting the child when they died. The important distinction to bear in mind is that in these circumstances the death of the surviving parent, grandparent or great-grandparent occurs after the birth of the after-born child. In other words, once born, the after-born child is a living person and a child for all purposes flowing from the FLA. As such, the child's parent is subject to make adequate provision for the child by will or intestacy. If the child's grandparent or great-grandparent is supporting the child in place of a parent during their lifetime, the child can apply for maintenance and support as if the grandparent or great-grandparent were a parent.

2. INHERITANCE FROM THE DECEASED PARENT

a. By intestacy

i. The law in Alberta

[79] As is the case for family maintenance and support, the WSA extends the definition of "child" to include a child who was in the womb for purposes of inheritance by intestacy. The WSA provides:

> **Definitions**
>
> 58(2) A reference in this Part [Distribution of Intestate Estates] to a "child", to a "descendant" or to "kindred" includes any child who is in the womb at the time of the deceased's death and is later born alive.

Again, this definition excludes after-born children. Although the deceased may have consented to the after-death use of his or her reproductive material or embryo by a surviving spouse or partner, any child resulting from such a procedure would not qualify to inherit if the deceased parent died fully or partially intestate.

ii. The law in other jurisdictions

[80] The current Alberta provision reflects the position commonly held across Canada, throughout the Commonwealth and in many American states.

[81] There are some jurisdictions where a child born using assisted reproduction after the death of a genetic parent is allowed to inherit on intestacy. However, in such jurisdictions the legislation makes express provision for this to occur. For example, recent amendments in British Columbia allow an after-born child to inherit from the deceased genetic parent if born within two years after the parent's death. The deceased's surviving spouse or partner also has to give notice to the administrator of the deceased's estate:[74]

> **Posthumous births if conception after death**
>
> **81.(1)** A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:
>
> (a) a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;
>
> (b) the descendant is born within 2 years after the deceased person's death, and lives for at least 5 days;
>
> (c) the deceased person is the descendant's parent under Part 3 of the *Family Law Act*.
>
> **(2)** The right of a descendant described in subsection (1) to inherit from the relatives of a deceased person begins on the date the descendant is born.
>
> **(3)** Despite subsection (1)(b), a court may extend the time set out in that subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.

[82] In the United States, the Uniform Probate Code was amended in 2008 to provide for after-born children. This recognition of the right to inheritance on

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[74] *Wills, Estates and Succession Act*, SBC 2009, c 13.

intestacy by these children is important as it may influence state legislatures.[75] Under section 2-120(k):[76]

> **Section 2-120 Child Conceived by Assisted Reproduction Other than Child Born to Gestational Carrier**
>
> (k) [When Posthumously Conceived Child Treated as in Gestation] If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:
>
> (1) in utero not later than 36 months after the individual's death; or
>
> (2) born not later than 45 months after the individual's death.

Section 2-104(a)(2) provides that for the purposes of intestate succession an individual in gestation is deemed to be living at the time of the intestate's death if the individual lives for 120 hours after birth. Section 3-703 also provides that personal representatives can take account of the possibility of an after-born child in distributing an estate.

[83] Some American states also have express legislation to allow an after-born child to inherit on intestacy.[77] For example, some state legislation is similar to that in British Columbia in allowing a two-year window for the birth of an after-born child.[78] Other states allow a longer window.[79]

[84] In 1984, the Warnock Commission in the United Kingdom considered the question of succession rights for after-born children. The opinion of the Commission was that assisted reproduction after death should be "actively discouraged." Finality in the administration of estates was essential. They recommended legislation stipulate that any child who was not *en ventre sa mère*

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[75] Raymond C O'Brien, "The Momentum of Posthumous Conception: A Model Act" (2009) 25:2 J Contemp Health L & Pol'y 332 at 363; Sheldon F Kurtz & Lawrence W Waggoner, "The UPC Addresses The Class-Gift and Intestacy Rights of Children of Assisted Reproduction" (2009) 35:1 ACTEC J 30.

[76]. Uniform Probate Code (1969), online: Uniform Law Commission <http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf>, § 2-120(k).

[77] Benjamin C Carpenter, "Sex Post Facto: Advising Clients Regarding Posthumous Conception" (2012) 38 ACTEC LJ 187. These states include California, Colorado, Florida, Iowa, Lousiana, Maryland, New Jersey, New Mexico, and North Dakota.

[78] The Io Code Ann §15-4 (2013); Md Est and Tr Code Ann, §3-107 (Lexis 2013).

[79] Lou Rev Stat Ann § 9-391.1(A) (2013); Cal Prob Code §§ 249.5-249.8 (2012); Nm Stat Ann §§ 45-2-120(k), 121(h) (2011); Nd Cent Code Ann § 30.1-04-19(11) (2013).

be ignored for purposes of inheritance. [80] More recent discussions of the law surrounding assisted reproduction in the United Kingdom have not discussed inheritance.[81]

[85] In 2007, the New South Wales Law Reform Commission considered whether after-born children should be provided for under model intestacy legislation. The Commission acknowledged that current provisions concerning *en ventre sa mère* were deficient. Their view was that it would be too administratively complex to grant after-born children any rights on succession. As a result, they recommended that after-born children be excluded.[82] This recommendation is similar to that made in an earlier report.[83]

iii. Need for reform

[86] For the same reasons noted in the discussion of family maintenance and support, ALRI concludes that there is no sound policy reason to change the law of intestate succession to provide for an after-born child. The after-born child does not have enforceable rights until born alive. To provide a meaningful remedy for a future claim by an after-born child would require some portion of the intestate estate to be set aside. To do so through legislation would mean limiting the rights of living persons and subjecting them to potential claims of those who have no legal existence.

[87] Further, in the majority of estates there will be no basis for a separate intestate share for any child, let alone for a potential after-born child. Under the WSA Part 3, if the deceased leaves no descendants, the entire intestate estate goes to the surviving spouse or partner. If the deceased leaves descendants, the surviving spouse or partner will also receive the entire intestacy if all the deceased's descendants are also the spouse's or partner's descendants. Only if

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[80] UK, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314, (London: Her Majesty's Stationery Office, 1984) at paras 10.9, 10.15, online: <http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf>.

[81] UK, House of Commons Science and Technology Committee, *Human Reproductive Technologies and the Law* (5th Report of Session 2004-2005), vol 1 (London: The Stationery Office Limited, 2005); UK, HC, "Review of the Human Fertilisation and Embryology Act: Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos)", Cm 6989 (2006); UK, HC,"Government Response to the Report from the Joint Committee on the Human Tissue and Embryos (Draft) Bill", Cm 7209 (2007).

[82] New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2007) at 126-129, 261-262.

[83] New South Wales Law Reform Commission, *Artificial Conception: Human Artificial Insemination*, Report 49 (1986) at paras 12.8-12.9 (however, the Commission recommended that paternity be recognized and that these children should be allowed to apply for dependant's relief [at para 12.10]).

the deceased leaves descendants who are not also descendants of the spouse or partner and the value of the intestate estate exceeds $150,000, would a child or a descendant take a separate share.[84] Where these two conditions are met, the WSA provides for a *per stirpes* distribution to descendants subject to the spouse's or partner's preferential share. However, the WSA section 66 again requires a child to have survived the deceased. A survivor must be living at the deceased's death and an after-born child is not.

b. Under a will – generally

i. The law in Alberta

[88] As occurs elsewhere in the WSA, the definition of "child" in interpreting a will includes a child who was in the womb when the deceased died. The WSA provides:

> **References to children, descendants or issue**
>
> **28** Unless the Court, in interpreting a will, finds that the testator had a contrary intention, references in the will to the children, descendants or issue of any individual, including the testator, must be interpreted as including
>
> (a) any child for whom that individual is a parent within the meaning of Part 1 of the *Family Law Act*, and
>
> (b) any child who is in the womb at the time of the testator's death and is later born alive.

Although the WSA section 28 adopts different wording than section 58, it too excludes after-born children. Although the deceased may have consented to the after-death use of his or her reproductive material by a surviving spouse or partner, a child born from such a procedure will generally not be included under the deceased's will. The WSA section 27 also provides that a will is to be interpreted on the basis of conditions existing just before the time of death. Those conditions would not include an after-born child.

ii. The law in other jurisdictions

[89] As noted, the British Columbia *Wills, Estates and Succession Act*, section 8.1 includes an after-born child as a descendant for purposes of inheritance, provided that notice is given and the after-born child is born within two years.

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[84] *Preferential Share (Intestate Estates) Regulation*, Alta Reg 217/2011.

iii. The need for reform

[90] As has been stated repeatedly in this report, making effective provision by operation of law for an after-born child would limit the interests of living persons to the deceased parent's estate and would subject them to the future interests of those who have no legal existence. As discussed in the next section, the WSA allows the deceased parent who intends to provide for the possibility of an after-born child to do so by a carefully drafted will. There is no reason to change the definition of child that would apply to all wills to achieve the result that a small number of testators can achieve by careful drafting.

c. Under a will – contrary intention

i. The law in Alberta

[91] The definition of child in the WSA section 28 applies unless the court finds that the testator had a contrary intention. In other words, where the testator's intent is to provide for after-born children, the testator may do so. Contrary intention may be gleaned from evidence external to the will. For example, the WSA section 26 would allow the court to consider "the context of the testator's circumstances at the time of the making of the will." Thus, the fact that the deceased had stored reproductive material or embryos and had consented to after-death use for reproductive purposes by his or her spouse or partner may be part of that context. However, it is unclear whether a court would find sufficient contrary intention to oust the statutory definition of child by external evidence of storage and consent. Further, the will may have been made before assisted reproduction was contemplated, let alone the possibility of assisted reproduction after the testator's death. As such, a person who has consented to the after-death use of his or her reproductive material or embryos for reproductive purposes should consider an express testamentary provision to provide for an after-born child rather than leaving the result to the court's assessment of external evidence.

[92] Express drafting to provide for an after-born child also needs to bear in mind the potential for a perpetuities problem and the effect of the class closing rules to avoid a perpetuities problem. The rule against perpetuities requires that an interest must vest within 21 years after the death of a life in being. If it vests after that time the gift fails. One option for reducing problems in this regard would be to provide for after-born children separately from any other beneficiaries. In other words, if including after-born children gives rise to perpetuities problems which can be solved by closing the class of beneficiaries to

exclude after-born children, then it is more effective to draft a separate provision for after-born children.

[93] If a will makes an unconditional gift to after-born children, a perpetuities problem is avoided as the surviving spouse or partner is the obvious choice as a life in being. Under the AHRA, consent for after-death use of reproductive material or embryos can only be given to the deceased's spouse or partner. Any after-born children would typically be born within the spouse's or partner's lifetime; the 21 year period after the spouse's or partner's death adds an overly long period of safety. The viable shelf-life of stored reproductive material or embryos or the surviving wife's or female partner's ability to bear a child will also limit the time frame for the possibility of an after-born child.[85] A perpetuities problem could still arise if a gift has a condition that takes it outside the perpetuities period. For example, a gift to "my after-born children who reach the age of 30" raises a red flag for potential perpetuities violation. Similarly, a gift to "my after-born children's children" might also be problematic. In such circumstances, the *Perpetuities Act* section 4 would apply to wait and see if the gift actually fails.[86]

[94] While it would be possible for an after-born child to be born to a surrogate outside of the perpetuities period, under ALRI's proposed recommendations such a child would not be a child of the deceased parent. Such a child would only be the child of the surrogate.

[95] Further discussion of the *Perpetuities Act* occurs later in this report.

ii. The need for reform

[96] As a testator can already provide for an after-born child by a carefully drafted will, there is no need to amend the WSA.

3. INHERITANCE THROUGH THE DECEASED PARENT

[97] In addition to determining parentage for all purposes of Alberta law, the FLA determines other relationships that flow from the status of parent and child:

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[85] Viability of stored reproductive material and embryos is one reason why some jurisdictions limit storage time. See footnote 27.

[86] *Perpetuities Act*, RSA 2000, c P-5.

> **Rules of parentage**
>
> 7 (3) The relationship of parent and child, and the kindred relationships flowing from that relationship, shall be determined in accordance with this Part.

In the context of this report, the after-born child is not born until after the death of the genetic parent. With respect to inheriting from other relatives, the after-born child may be born after the relative's death or while the relative is still alive.

a. After-born child is born after relative dies

[98] Where the relative dies before the after-born child is born, the situation will be the same as for inheritance from the deceased genetic parent. The after-born child will not inherit from the relative by intestacy. Nor will the after-born child inherit under the relative's will in most cases. Only if the relative has shown a contrary intention to include the after-born child is it possible for an after-born child to inherit from a predeceased relative.

b. After-born child is born before relative dies

[99] As discussed up to this point, the key barrier for an after-born child to inherit from a predeceased parent or relative is that the child does not have enforceable legal rights until born alive. That is not the case where the after-born child is born before the relative dies. Once born, an after-born child would be the child of his or her parent for all purposes if ALRI's proposal to amend the FLA is adopted. The living after-born child then meets the requirements to inherit by will or intestacy when the relative dies. Thus, any reference in a will to a class of family member that would include the after-born child (e.g. grandchildren, nieces or nephews) will allow him or her to inherit. This result will occur even where the will was drafted before the after-born child was born. Wills are typically drafted in inclusive terms to account for all grandchildren living at a testator's death for example. Where this is not the result that the testator would want it is open to him or her to expressly exclude the after-born child.

E. *Perpetuities Act*

[100] As noted earlier, in drafting a provision to benefit an after-born child, most perpetuities problems are avoided where the surviving spouse or partner is the life in being. However, perpetuities legislation is based on the assumption that a person could not have a child after their death outside of the short time

frame for a child *en ventre sa mère*. What are the implications of ALRI's proposals to recognise parentage for after-born children?

[101] There are two areas where the possibility of an after-born child may have implications for the *Perpetuities Act*.[87] The first concerns the presumptions in section 9 regarding when a person has the ability to have a child:

> **Presumptions and evidence as to future parenthood**
>
> **9(1)** When, in proceedings respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then
>
> (a) it shall be presumed
>
> (i) that a male is able to have a child at the age of 14 years or over, but not under that age, and
>
> (ii) that a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years,
>
> but
>
> (b) in the case of a living person, evidence may be given to show that the person will or will not be able to have a child at the time in question.

The Act caps a woman's ability to have a child at age 55 but has no upper age limit for a man. The ability to have a child was also implicitly ended for both men and women upon death. For example a woman who died at age 35 was not notionally able to have a child for a further 20 years for perpetuities purposes. Nor would the death of a man at 80 transform him from a fertile octogenarian to a fertile decedent. The presumptions in section 9 simply have no application beyond death. This conclusion is supported both by the historical context of perpetuities law and the *Perpetuities Act*, as well as by the internal context which limits introducing evidence of fertility to "living persons." Consequently, the gift-saving rule in section 9 only applies to limit a living person's ability to have children.

[102] Is it then necessary to amend the *Perpetuities Act* to include a presumption that a person is not able to have a child after their death? Such a rule was implicit in the common law. While section 9 creates a narrower rule for living persons,

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[87] *Perpetuities Act*, RSA 2000, c P-5.

the common law arguably continues. As such, in the ordinary course of interpreting wills and trust documents, the possibility of after-born children would not be considered. This is an appropriate result, as to do otherwise would lead to gift failure. In those circumstances where a person wishes to benefit an after-born child, this may be achieved through careful drafting.

[103] The second area where the possibility of an after-born child may have implications is with respect to the current wording of section 1. Section 1 provides that "in being" includes "conceived but unborn." This phrase could be interpreted to include stored embryos. However, this interpretation would be contrary to the historical context and the original wording of the Act. When the *Perpetuities Act* was first enacted in 1972, it was not possible to store human embryos or for legislators to contemplate the range of assisted reproductive practices that exist today. Indeed as noted in ALRI's background report to the Act:[88]

> ... Ontario, like England, refers to the possibility that a person may have a child by "legitimation, adoption or other means." We are not aware of "other means" and propose to omit that phrase.

The historical context only supports the concept of a child *en ventre sa mère*. So too does the original wording of the Act: " 'in being' means living or en ventre sa mere."[89] The phrase "conceived but unborn" was introduced in the 1980 statute revision.[90] While language changes that give better expression to the meaning of the law are within the authority of a statute revision, those that change the sense of an enactment are not.[91] Accordingly, the definition of "in being" cannot be interpreted as extending beyond a child *en ventre sa mère* to a preserved embryo.

[104] While other law reform agencies have sometimes touched on assisted reproduction after death as a potential perpetuities problem, where reform has occurred it has been in the context of overall perpetuities reform. For example, the English Law Commission considered the issue but found no further change was needed after the adoption of a fixed 125-year perpetuity period.[92] Manitoba had already abolished the rule against perpetuities before the Manitoba Law Reform Commission made its recommendations concerning parentage for after-

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[88] Institute of Law Research and Reform (Alberta), *Report on the Rule Against Perpetuities*, Report 6 (1971) at 4, online: Alberta Law Reform Institute <www.alri.ualberta.ca/docs/fr006.pdf>.

[89] *Perpetuities Act*, SA 1972, c 121, s 1(c).

[90] *Perpetuities Act*, RSA 1980, c P-4.

[91] *Revised Statutes 1980 Act*, SA 1979, c 66.

[92] Law Commission (England and Wales), *The Rules Against Perpetuities and Excessive Accumulations* (1998).

born children.[93] Reform on this scale is beyond the scope of the current report. ALRI considers that the historical context of perpetuities rules and remaining common law rules are sufficient to exclude the possibility of an after-born child when applying gift-saving rules.

F. Statutory Survivor Benefits

1. *CANADA PENSION PLAN ACT*

[105] The *Canada Pension Plan Act* provides for a benefit to the surviving child of a deceased contributor.[94] While the Act continues to refer to an "orphan's benefit," the applicable form and online information refers to a "surviving child's benefit."[95] References to the child as an orphan, survivor and a dependent all speak to the assumption that the child is alive at the time of the parent's death. The application also requires the child's Social Insurance Number or birth certificate. Collectively, the implication is that an after-born child would not be eligible for the benefit. However, the Canada Pension plan is under federal jurisdiction and proposals for reform would be outside the scope of this report.[96]

2. *WORKERS' COMPENSATION ACT*

[106] Where a person dies in a work-related accident, his or her dependent children may be eligible for compensation.[97] A dependent child is entitled to a pension payable to the deceased's surviving spouse or partner or to the child's guardian. The Act defines "dependant" in section 1:

> **Definitions**
>
> **1(h)** "dependant" means a member of the family of a worker who was wholly or partially dependent on the worker's earnings at the time of the worker's death or who, but for the death or disability due

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[93] Manitoba Law Reform Commission, *Report on the Rules Against Accumulations and Perpetuities*, Report 49 (1982).

[94] *Canada Pension Plan Act*, RSC 1980, c C-8.

[95] *Canada Pension Plan Act*, RSC 1980, c C-8, s 44; Form SC ISP-1300A.

[96] Similarly, federal legislation conferring specific benefits on surviving children of Canadian forces members is also beyond the scope of this report. A cursory review of the legislation suggests that benefits are limited to children who are survivors or dependants at the time of the parent's death: *Pension Act*, RSC 1985, c P-6; *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21; *Children of Deceased Veteran's Education Assistance Act*, RSC 1985, c C-28.

[97] *Workers' Compensation Act*, RSA 2000, c W-15, s 70.

> to the accident, would have been so dependent, but a person is not a partial dependant of a worker unless the person was partially dependant on contributions from the worker for the provision of the ordinary necessaries of life;

In contrast to other provisions considered in this report, the Act refers to a family member who might have been dependent "but for the death or disability due to the accident." Is this wording broad enough to include an after-born child?

[107] In *Elgie v Alberta (Workers' Compensation Board Appeals Commission)*, the worker separated from his wife and was subsequently killed in a workplace accident.[98] At the date of his death, the worker had not been contributing to the financial support of his wife or their three children. The wife applied to the Worker's Compensation Board for pension benefits for both herself and their youngest child.

[108] The wife's application was denied as the Board found that she did not fit within the definition of "dependant". She had not been receiving financial support from the worker; thus, she was not dependent on his earnings at the time of his death. Further, she was living on her own and had not commenced a court proceeding to seek support from the worker.[99] In turn the wife argued that if the worker had not died, she would have been entitled to seek financial support from him in a divorce action. In other words, but for his death, she would have had a legal entitlement to receive his support.

[109] The Court of Appeal eventually ruled in the wife's favour. While it was true that neither she nor the child had been actually dependent on the worker's earnings as at the date of death, they did have a legal entitlement to receive support from him. This was sufficient to bring both the wife and child within the definition of "dependant".[100] In coming to this conclusion, the Court stated the following:

> But the statutory definition of "dependant" goes further. It also references the future, in the sense that the Board must evaluate whether applicants, "but for the death or disability due to the accident, would have been so dependent ...". Thus the subsection goes on to protect those entitled to contributions from the worker's earnings for the ordinary necessaries of life, even though they are not yet being received. It is a present right or entitlement to a future

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[98] *Elgie v Alberta (Workers' Compensation Board Appeals Commission)*, 2009 ABCA 277 [*Elgie*].

[99] *Elgie*, note 98 at paras 3-7.

[100] *Elgie*, note 98 at paras 48-49.

> benefit that would have come into play but for the worker's death. It means that where a family member is legally entitled to contributions from a worker towards the ordinary necessaries of life, but death has intervened before the process of recovering those contributions has begun or been completed, the member of the family will still be a dependant under the Act.
>
> Professor Terence Ison's comments about provisions such as these, which are common across Canada, are helpful and support this view. In *Workers' Compensation in Canada*, 2d ed. (Toronto: Butterworths, 1989) at para. 5.9.15, he states:
>
> > It is generally sufficient and required that the family member was dependent upon the worker at the date of his death. Where there was no such dependant, however, or sometimes in other situations, *there are provisions authorizing dependants' benefits to a spouse, child or parent who, though not dependent upon the worker at the time of his death, had a reasonable expectation of pecuniary benefit from the continuation of the life of the worker.* [emphasis added]

[110] The decision in *Elgie* is premised on the fact that the wife and child had a present legal entitlement to receive support from the worker as of the date of his death. In contrast, an after-born child would not have legal rights or entitlement to anything as of the date of the parent's death. Accordingly, an after-born child would not appear to be covered by the broader definition of "dependant" under the *Workers' Compensation Act*.

[111] There is a related question of whether the birth of an after-born child would extend the period of time for which the deceased worker's surviving spouse would be eligible for a pension. Section 70 prescribes that the dependent spouse may receive a pension until the youngest child turns 18. However, the question comes back to whether an after-born child is a dependent child under the Act. On the basis of *Elgie* an after-born child would not qualify as a dependent child and, thus, would not extend the period during which a pension is payable to the dependent spouse.

[112] ALRI does not consider that reform is needed in this area, given the result in *Elgie*. However, given that there is some uncertainty, ALRI has drawn this point to the attention of the Workers' Compensation Board who is best placed to determine if clarification is needed and whether any change should be legislative or achieved through operating policies.

3. *FATAL ACCIDENTS ACT*

a. The law in Alberta

[113] The *Fatal Accidents Act* [FAA] allows relatives of people killed by the wrongdoing of others to recover damages. [101] In particular, section 8 provides for damages for bereavement i.e. grief, loss of guidance, care and companionship. Damages for bereavement are available to the spouse or partner, the parents, and children of the person killed by wrongdoing. A claim for bereavement does not require proof of actual loss. Eligibility for damages for bereavement does not survive the death of the spouse, partner, parent or child.

[114] Does section 8 extend to a claim for bereavement by an after-born child?[102] The historic context of the FAA suggests that it does not. The roots of the FAA can be traced back to 19th century English legislation which later became the law in Alberta.[103] The purpose of such legislation was clearly to compensate close family members who survived the deceased as there was no compensation available to them at common law. The requirement of survivorship is clear in the fact that a section 8 claim does not survive the death of the family member to benefit his or her estate. Moreover, section 8 initially limited damages for bereavement to a minor child and set a fixed sum that was to be shared among the deceased's surviving minor children.[104] Section 8 was amended to allow a separate amount for each child who was a minor at the time of the deceased's death and to some children up to age 26.[105] An after-born child would not qualify

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[101] *Fatal Accidents Act*, RSA 2000, c F-8 [FAA].

[102] Section 8 does not expressly include a child *en ventre sa mère* in the definition of child. However, *Fitzsimmonds v Royal Insurance Co. of Canada* argues that the legal concept of a child *en ventre sa mère* is so well known that it is unreasonable to exclude them from the definition of child. *Fitzsimmonds v Royal Insurance Co of Canada* (1984), 51 AR 368 (CA) at para 4:

> A fiction has developed in the law that in respect of property rights, an unborn child who is subsequently born alive is in the same position as a child living at the time of the death of the benefactor. This fiction has existed for over a century and is so well established that for a statute conferring property rights on children to be interpreted as excluding a child who was *en ventre sa mère* at the time of the death of the father would require specific words of exclusion. In interpreting statutes such as the Insurance Act I think cognizance must be taken of this fiction. It would be known to legislative draftsmen and the legislation would be passed with this fiction in mind.

[103] *An Act for Compensating the Families of Persons Killed by Accidents*, (1846) 9 & 10 Vic, c 93 commonly known as Lord Campbell's Act.

[104] *Fatal Accidents Act*, RSA 1980, c F-5

[105] The *Fatal Accidents Amendment Act 1994*, SA 1994, c 16 replaced s 8(2)(c) to provide:

> **Damages for bereavement**
>
> **8(2)** If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of ...
>
> (c) $27,000 to each child of the deceased person who, at the time of the death of the deceased person, is

Continued

as a child at the time of the deceased's death. The qualifying conditions that a child be a minor or single at the time of the parent's death were later removed.[106] However, there is nothing in the legislative record to suggest that removing the conditions based on age or marital status was intended to remove the long-standing requirement that the child be alive at the time of the parent's death.

[115] The FAA also imposes procedural hurdles against a claim for bereavement by an after-born child. Section 3 encourages an action to be brought within a year after the death and section 4 limits claims to a single action. FAA claims are subject to the *Limitations Act*; the two year limitation period begins to run at the date of the death.[107] By the time an after-born child is born, the limitation period will likely have run out. As long as an action under the FAA remains open, it might be possible to add an after-born child as a party. However, keeping the action open and unresolved could be to the detriment of those who were alive at the time of death.

b. The law in other jurisdictions

[116] Ontario's *Family Law Act* is similar to the FAA. Under that Act children are able to claim damages if a parent is killed by the fault of another. In the personal injury case of *Garland v Rowsell*, the plaintiff brought an action for injuries she sustained during a car accident and later attempted to add her two children to the proceedings so that they could claim damages under the Ontario *Family Law Act*.[108] The elder child had been *en ventre sa mère* at the time of the car accident. The younger child was born three years after the accident. The Court held that the younger child was not entitled to bring a claim for damages. The younger child did not have any legal existence at the date of the accident and, as a result, it was improper to allow him to claim damages arising from the incident. Similar reasoning could be applied by extension to Alberta's FAA.

c. Need for reform

[117] Even though an after-born child never met the deceased parent, he or she may still feel the loss of guidance, care and companionship of that parent and

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(i) a minor, or

(ii) unmarried and 18 years of age or older and has not reached the child's 26th birthday and is not living with a cohabitant.

[106] *Justice Statutes Amendment Act, 2002*, SA 2002, c 17, s 2; *Fatal Accidents Amendment Act, 2010*, SA 2010, c 6, s 3.

[107] *Sousa v Mayo*, 2005 ABQB 845 at paras 19 and 35.

[108] *Garland v Rowsell (1990)*, 73 OR (2d) 280 at para 14 (Dist Ct).

may well grieve the parent's death. Should after-born children be included for purposes of FAA claims?

[118] While the historical context and procedural provisions of the FAA speak against allowing a claim by an after-born child, so too does tort law. Although the FAA is a statutory regime created to remedy the common law's deficiency in denying compensation to surviving family members of a person killed by wrongdoing, tort law principles are still relevant to understand and direct the policy of the FAA. Given the increased availability of assisted reproduction and storage of human reproductive material and embryos, an after-born child is a foreseeable possibility. Though foreseeable, the possibility is a remote one. As noted, elsewhere in this report, very few after-born children are likely to be born each year. Of these, even fewer would have had a genetic parent die in circumstances that would give rise to a claim under the FAA. There is also no chain of causation leading from the wrongdoer's act to the after-born child's birth. The decision to pursue assisted reproduction is entirely in the control of the surviving spouse or partner. The only common fact is the death of the genetic parent, but this is not a causal link. On the basis of remoteness and lack of causality it would be inappropriate to amend the FAA to extend a claim for bereavement to an after-born child. Moreover, if the FAA were to be amended specifically to include a claim by an after-born child it would create an inconsistency with tortious acts that fall outside the FAA. Section 8 of the FAA should remain limited to the close family members who survive the deceased.

G. *Insurance Act*

[119] Given the range of contractual benefits that might be available to survivors, it is neither possible nor practical to provide a complete survey here. As has been shown through the review of statutory benefits, where the language refers to survivors or to dependants, there are strong arguments that an after-born child is not included. The benefits are limited to those who are living at the time of death and who survive the deceased.

[120] It is relevant, however, to consider benefits provided under insurance contracts. The Alberta *Insurance Act* provides: [109]

> **664(1)** If a beneficiary predeceases the person whose life is insured and no disposition of the share of the deceased beneficiary in the

[109] *Insurance Act*, RSA 2000, c I-3.

> insurance money is provided for in the contract or by a declaration, the share is payable
>
> (a) to the surviving beneficiary,
>
> (b) if there is more than one surviving beneficiary, to the surviving beneficiaries in equal shares, or
>
> (c) if there is no surviving beneficiary, to the insured or the insured's personal representative.

The effect of section 664(1) is clear. In order to receive life insurance proceeds, the designated beneficiary under a contract of life insurance must be alive as at the date of the insured's death. Ontario's *Insurance Act* has a provision that is identical to section 664(1).[110] In interpreting that provision, the Ontario Court of Justice stated: "If a sole designated beneficiary predeceases the insured, by operation of statute the insurance proceeds are payable to the insured's personal representative."[111] An after-born child is not alive as of the date of the death; the child may not be designated as a beneficiary under that parent's life insurance contract. This accords with the legal principle that a person must be born alive in order to accrue enforceable legal rights.

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[110] *Insurance Act*, RSO 1990, c I.8, s 194(1).

[111] *Ferry Estate v Non-Marine Underwriters of Lloyd's of London* (1997), 36 OR (3d) 211 at para 3 (Ct J).

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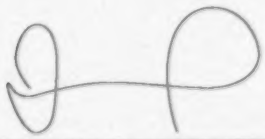

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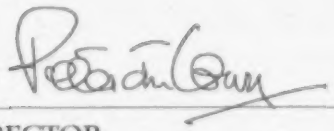

DIRECTOR

Appendix A:
Family Law Act Provisions

Family Law Act

Part 1
Establishing Parentage

Interpretation

5.1(1) In this Part,

(a) "assisted reproduction" means a method of conceiving other than by sexual intercourse;

(b) "embryo" means an embryo as defined in the *Assisted Human Reproduction Act* (Canada);

(c) "human reproductive material" means human reproductive material as defined in the *Assisted Human Reproduction Act* (Canada);

(d) "surrogate" means a person who gives birth to a child as a result of assisted reproduction if, at the time of the child's conception, she intended to relinquish that child to

(i) the person whose human reproductive material was used in the assisted reproduction or whose human reproductive material was used to create the embryo used in the assisted reproduction, or

(ii) the person referred to in subclause (i) and the person who is married to or in a conjugal relationship of interdependence of some permanence with that person.

(2) For the purposes of this Part, if a child is born as a result of assisted reproduction, the child's conception is deemed to have occurred at the time the procedure that resulted in the implantation of the human reproductive material or embryo was performed.

2010 c16 s1(6)

Application of Part

6 This Part does not apply to an application under section 13 of the *Child, Youth and Family Enhancement Act*.

2003 cF-4.5 ss6,114;2003 c16 s117

Rules of parentage

7(1) For all purposes of the law of Alberta, a person is the child of his or her parents.

(2) The following persons are the parents of a child:

(a) unless clause (b) or (c) applies, his or her birth mother and biological father;

(b) if the child was born as a result of assisted reproduction, a person identified under section 8.1 to be a parent of the child;

(c) a person specified as a parent of the child in an adoption order made or recognized under the *Child, Youth and Family Enhancement Act*.

(3) The relationship of parent and child, and the kindred relationships flowing from that relationship, shall be determined in accordance with this Part.

(4) A person who donates human reproductive material or an embryo for use in assisted reproduction without the intention of using the material or embryo for his or her own reproductive use is not, by reason only of the donation, a parent of a child born as a result.

(5) A person who was married to or in a conjugal relationship of interdependence of some permanence with a surrogate at the time of the child's conception is not a parent of the child born as a result of the assisted reproduction.

(6) All distinctions between the status of a child born inside marriage and a child born outside marriage are abolished.

2003 cF-4.5 s7;2010 c16 s1(7)

Presumption of parentage — biological father

8(1) For the purposes of section 7(2)(a), unless the contrary is proven on a balance of probabilities, a male person is presumed to be the biological father of a child and is recognized in law to be a parent of a child in any of the following circumstances:

(a) he was married to the birth mother at the time of the child's birth;

(b) he was married to the birth mother by a marriage that within 300 days before the birth of the child ended by

(i) death,

(ii) decree of nullity, or

(iii) judgment of divorce;

(c) he married the birth mother after the child's birth and has acknowledged that he is the father;

(d) he cohabited with the birth mother for at least 12 consecutive months during which time the child was born and he has acknowledged that he is the father;

(e) he cohabited with the birth mother for at least 12 consecutive months and the period of cohabitation ended less than 300 days before the birth of the child;

(f) he is registered as the parent of the child at the joint request of himself and the birth mother under the *Vital Statistics Act* or under similar legislation in a province or territory other than Alberta;

(g) he has been found by a court of competent jurisdiction in Canada to be the father of the child for any purpose.

(2) Where circumstances exist that give rise to a presumption under subsection (1) that more than one male person might be the father of a child, no presumption as to parentage may be made.

(3) Subsection (1) does not apply in the case of a child born as a result of assisted reproduction.

2003 cF-4.5 s8;2010 c16 s1(8);2010 c16 s1(8)

Assisted reproduction

8.1(1) In this section and section 8.2,

(a) a reference to the provision of human reproductive material by a person means the provision of the person's own human reproductive material to be used for his or her own reproductive purposes;

(b) a reference to the provision of an embryo by a person means the provision of an embryo created using the person's own human reproductive material to be used for his or her own reproductive purposes.

(2) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a male person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person is declared to be a parent, the male person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the male person at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a female person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the female person is declared to be a parent, the female person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the female person at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(4) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person and a female person, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person and female person are each declared to be a parent, the male person and the female person;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(5) If a child is born as a result of assisted reproduction without the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(a) or (b), the parents of the child are the birth mother and a person who

(a) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception.

(6) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to or in a conjugal relationship of interdependence of some permanence with,

(a) in the case of a child born in the circumstances referred to in subsection (2), the male person referred to in that subsection,

(b) in the case of a child born in the circumstances referred to in subsection (3), the female person referred to in that subsection, or

(c) in the case of a child born in the circumstances referred to in subsection (5), the birth mother.

2010 c16 s1(9)

Surrogacy

8.2(1) An application may be made to the court for a declaration that

(a) a surrogate is not a parent of a child born to the surrogate as a result of assisted reproduction, and

(b) a person whose human reproductive material or embryo was provided for use in the assisted reproduction is a parent of that child.

(2) Subject to subsection (3), the following persons may make an application under subsection (1):

(a) the surrogate;

(b) a person referred to in subsection (1)(b);

(c) a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b).

(3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person referred to in subsection (1)(b) and a female person referred to in subsection (1)(b), only the surrogate, the male person or the female person may make an application under subsection (1).

(4) An application under subsection (1) may not be commenced more than 30 days after the date of the child's birth unless the court allows a longer period.

(5) Unless the court directs otherwise, the following persons must, in accordance with the regulations, be served with notice of the application:

(a) if a surrogate brings an application under subsection (1),

(i) a person referred to in subsection (1)(b),

(ii) unless subsection (3) applies, a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b), and

(iii) any other person as the court considers appropriate;

(b) if a person referred to in subsection (1)(b) brings an application under subsection (1),

(i) the surrogate,

(ii) unless subsection (3) applies, a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b),

(iii) if subsection (3) applies, the other person referred to in subsection (1)(b), and

(iv) any other person as the court considers appropriate;

(c) if a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b) brings an application,

(i) the person referred to in subsection (1)(b),

(ii) the surrogate, and

(iii) any other person as the court considers appropriate.

(6) The court shall make the declaration applied for if the court is satisfied that

(a) the child was born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(b), and

(b) the surrogate consents, in the form provided for by the regulations, to the application.

(7) A person who is declared to be a parent of the child under subsection (6) and any person who, as a result of that declaration, is a parent of the child under section 8.1 are deemed to be the parents at and from the time of the birth of the child.

(8) Any agreement under which a surrogate agrees to give birth to a child for the purpose of relinquishing that child to a person

(a) is not enforceable,

(b) may not be used as evidence of consent of the surrogate under subsection (6)(b), and

(c) may be used as evidence of consent for the purposes of section 8.1(2)(b)(ii) or (3)(b)(ii).

(9) The court may waive the consent required under subsection (6)(b) if

(a) the surrogate is deceased, or

(b) the surrogate cannot be located after reasonable efforts have been made to locate her.

(10) If the court makes a declaration under subsection (6), the court shall identify in the declaration any person referred to in section 8.1(2)(b)(i) and (ii) or (3)(b)(i) and (ii), as the case may be, who is a parent as a result of that declaration.

(11) The court has jurisdiction under this section if the child is born in Alberta.

(12) An application may not be made under this section if

(a) the child has been adopted, or

(b) the declaration sought would result in the child having more than 2 parents.

2010 c16 s1(9)

Declaration respecting parentage

9(1) If there is a dispute or any uncertainty as to whether a person is or is not a parent of a child under section 7(2)(a) or (b), the following persons may apply to the court for a declaration that the person is or is not the parent of a child:

(a) a person claiming to be a parent of the child;

(b) a person claiming not to be a parent of the child;

(c) the child;

(d) a parent of the child, if the child is under the age of 18 years;

(e) a guardian of the child;

(f) a person who has the care and control of the child.

(2) This section does not apply where a child is born to a surrogate who has consented to an application under section 8.2.

(3) If the court finds that a living person is or is not a parent of a child, the court may make a declaration to that effect.

(4) If the court finds that a deceased person is or is not a parent of a child conceived before that person's death, the court may make a declaration to that effect.

(5) In making a declaration under this section, the court shall give effect to any applicable presumption set out in section 8 and any applicable provision of section 8.1.

(6) The court has jurisdiction under this section if

(a) the child is born in Alberta, or

(b) an alleged parent resides in Alberta.

(7) An application or declaration may not be made under this section if

(a) the child has been adopted, or

(b) the declaration sought would result in the child having more than 2 parents.

(8) When making a declaration of parentage, the court may, in order to facilitate registration under the *Vital Statistics Act*, order one or more of the following:

(a) if the child is less than 12 years of age at the time the application is made, that the Registrar of Vital Statistics register or amend the name of the child in accordance with section 10 of the *Vital Statistics Act*;

(b) that the Registrar of Vital Statistics add the name of a parent to the child's birth registration document;

(c) that the Registrar of Vital Statistics amend the parentage shown on the child's birth registration document.

(9) In making an order under subsection (8), the court shall consider the child's views and preferences.

(10) A declaration of the court that a person is not a parent of a child does not affect

(a) any rights and duties that have been exercised and observed, or

(b) any interests in property that have been distributed before the declaration is made, unless the court orders otherwise.

2003 cF-4.5 s9;2007 cV-4.1 s82;2010 c16 s1(10),(52); 2013 c23 s6

New evidence

10(1) Where

(a) a declaration of parentage has been made or an application for a declaration of parentage has been dismissed under section 9, and

(b) evidence of a substantial nature becomes available that was not available at the previous hearing,

the court may, on application by a person referred to in section 9(1), confirm a declaration, set aside a declaration or make a new declaration of parentage.

(2) A person may not bring an application under this section without the leave of the court.

(3) Notice of an application under this section shall be given to the persons referred to in section 11.

(4) The setting aside of a declaration of parentage under subsection (1) does not affect

(a) any rights and duties that have been exercised and observed, or

(b) any interests in property that have been distributed as a result of the declaration before it is set aside, unless the court orders otherwise.

2003 cF-4.5 s10;2010 c16 s1(11)

Notice of application

11(1) Unless the court directs otherwise, the following persons must, in accordance with the regulations, be served with notice of an application for a declaration of parentage under section 9:

(a) the person claimed to be the child, if the child is 16 years of age or older;

(b) each guardian of the person claimed to be the child;

(c) a person who has the care and control of the person claimed to be the child;

(d) any person claiming or alleged to be a parent of whom the applicant has knowledge;

(e) any other person, including a child under 16 years of age, as the court considers appropriate.

(2) Before making an order under this Part, the court must consider whether it is appropriate for a child who has not been served under this section to have notice of the application.

2003 cF-4.5 s11; 2010 c16 s1(12)

12 and **13** Repealed 2010 c16 s1(13).

Evidence not admissible

14 Evidence given in an application under this Part or Part 3 that tends to show that the person giving evidence had sexual intercourse with any person is not admissible against the person giving evidence in any other action under provincial law to which that person is a party.

Blood tests, etc.

15(1) On the request of a party to an application under this Part or Part 3 or on its own motion, the court may make an order granting leave to obtain blood tests, DNA tests or any other tests that the court considers appropriate from any person named in the order and to submit the results in evidence.

(2) An order under subsection (1) may be made subject to any terms and conditions the court considers appropriate.

(3) No test shall be performed on a person without the person's consent.

(4) If a person named in an order under subsection (1) is not capable of giving consent because of age or incapacity, the consent may be given by the person's guardian.

(5) If a person named in an order under subsection (1) or the person's guardian, as the case may be, refuses to consent to a test referred to in the order, the court may draw any inference it considers appropriate on behalf of the child without prejudice to the child in future proceedings.

Appendix B:
Sample Amendments

Family Law Act
Part 1
Establishing Parentage

Interpretation

5.1(1) In this Part,

(a) "assisted reproduction" means a method of conceiving other than by sexual intercourse;

(b) "embryo" means an embryo as defined in the *Assisted Human Reproduction Act* (Canada);

(c) "human reproductive material" means human reproductive material as defined in the *Assisted Human Reproduction Act* (Canada);

(d) "surrogate" means a person who gives birth to a child as a result of assisted reproduction if, at the time of the child's conception, she intended to relinquish that child to

(i) the person whose human reproductive material was used in the assisted reproduction or whose human reproductive material was used to create the embryo used in the assisted reproduction, ~~or~~

(ii) the person referred to in subclause (i) and the person who is married to or in a conjugal relationship of interdependence of some permanence with that person, *or*

(iii) where the person referred to in subclause (i) is deceased, the person who was married to or in a conjugal relationship of interdependence of some permanence with that person at the time of that person's death.

(2) For the purposes of this Part, if a child is born as a result of assisted reproduction, the child's conception is deemed to have occurred at the time the procedure that resulted in the implantation of the human reproductive material or embryo was performed.

Assisted reproduction

8.1(1) In this section and section 8.2,

(a) a reference to the provision of human reproductive material by a person means the provision of the person's own human reproductive material to be used for his or her own reproductive purposes;

(b) a reference to the provision of an embryo by a person means the provision of an embryo created using the person's own human reproductive material to be used for his or her own reproductive purposes.

(2) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a male person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person is declared to be a parent, the male person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the male person at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a female person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the female person is declared to be a parent, the female person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the female person at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(4) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person and a female person, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person and female person are each declared to be a parent, the male person and the female person;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(5) If a child is born as a result of assisted reproduction without the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(a) or (b), the parents of the child are the birth mother and a person who

(a) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception.

(5.1) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(a) or (b) and the child's conception occurred with consent after the person referred to in subsection (1)(a) or (b) has died, the parents of this child are

(a) unless clause (b) or (c) applies, the birth mother and the person referred to in subsection (1)(a) or (b);

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the person referred to in subsection (1)(a) or (b) is declared to be a parent, the person referred to in subsection (1)(a) or (b) and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the person referred to in subsection (1)(a) or (b) at the time of that person's death, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(c) unless section 9.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(6) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to or in a conjugal relationship of interdependence of some permanence with,

(a) in the case of a child born in the circumstances referred to in subsection (2), the male person referred to in that subsection,

(b) in the case of a child born in the circumstances referred to in subsection (3), the female person referred to in that subsection, or

(c) in the case of a child born in the circumstances referred to in subsection (5), the birth mother.

(6.1) Unless the contrary is proven, a person is presumed to be a parent of a child born in the circumstances referred to in subsection (5.1), if they were married to or in a conjugal relationship of interdependence of some permanence with the person referred to in subsection (1)(a) or (b) and gave consent to the procedure that resulted in the implantation of that person's human reproductive material or embryo for reproductive purposes.

Surrogacy

8.2(1) An application may be made to the court for a declaration that

(a) a surrogate is not a parent of a child born to the surrogate as a result of assisted reproduction, and

(b) a person whose human reproductive material or embryo was provided for use in the assisted reproduction is a parent of that child.

(2) Subject to subsection (3), the following persons may make an application under subsection (1):

(a) the surrogate;

(b) a person referred to in subsection (1)(b);

(c) a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b);

(d) if a person referred to in subsection (1)(b) is dead, the person who was married to or in a conjugal relationship of interdependence of some permanence with the person referred to in subsection (1)(b) at the time of that person's death.

(3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person referred to in subsection (1)(b) and a female person referred to in subsection (1)(b), only the surrogate, the male person or the female person may make an application under subsection (1).

(4) An application under subsection (1) may not be commenced more than 30 days after the date of the child's birth unless the court allows a longer period.

(5) Unless the court directs otherwise, the following persons must, in accordance with the regulations, be served with notice of the application:

(a) if a surrogate brings an application under subsection (1),

(i) a person referred to in subsection (1)(b),

(ii) unless subsection (3) applies, a person who was, ~~***at the time of the child's conception***~~ married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b) ***at the time of the child's conception or at the time the person referred to in subsection (1)(b) died***, and

(iii) any other person as the court considers appropriate;

(b) if a person referred to in subsection (1)(b) brings an application under subsection (1),

(i) the surrogate,

(ii) unless subsection (3) applies, a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b),

(iii) if subsection (3) applies, the other person referred to in subsection (1)(b), and

(iv) any other person as the court considers appropriate;

(c) if a person who was, at the time of the child's conception, married to or in a conjugal relationship of interdependence of some permanence with a person referred to in subsection (1)(b) brings an application,

(i) the person referred to in subsection (1)(b),

(ii) the surrogate, and

(iii) any other person as the court considers appropriate.

(d) if a person referred to in subsection (2)(d) brings an application.

(i) the surrogate, and

(ii) any other person as the court considers appropriate.

(6) The court shall make the declaration applied for if the court is satisfied that

(a) the child was born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(b), and

(b) the surrogate consents, in the form provided for by the regulations, to the application.

(7) A person who is declared to be a parent of the child under subsection (6) and any person who, as a result of that declaration, is a parent of the child under section 8.1 are deemed to be the parents at and from the time of the birth of the child.

(8) Any agreement under which a surrogate agrees to give birth to a child for the purpose of relinquishing that child to a person

(a) is not enforceable,

(b) may not be used as evidence of consent of the surrogate under subsection (6)(b), and

(c) may be used as evidence of consent for the purposes of section 8.1(2)(b)(ii), ~~*or*~~ (3)(b)(ii) ***or (5.1)(b)(ii).***

(9) The court may waive the consent required under subsection (6)(b) if

(a) the surrogate is deceased, or

(b) the surrogate cannot be located after reasonable efforts have been made to locate her.

(10) If the court makes a declaration under subsection (6), the court shall identify in the declaration any person referred to in section 8.1(2)(b)(i) and (ii) , (3)(b)(i) and (ii) or (5.1)(b)(i) and (ii), as the case may be, who is a parent as a result of that declaration.

(11) The court has jurisdiction under this section if the child is born in Alberta.

(12) An application may not be made under this section if

(a) the child has been adopted, or

(b) the declaration sought would result in the child having more than 2 parents.

Declaration respecting parentage

9(1) If there is a dispute or any uncertainty as to whether a person is or is not a parent of a child under section 7(2)(a) or (b), the following persons may apply to the court for a declaration that the person is or is not the parent of a child:

(a) a person claiming to be a parent of the child;

(b) a person claiming not to be a parent of the child;

(c) the child;

(d) a parent of the child, if the child is under the age of 18 years;

(e) a guardian of the child;

(f) a person who has the care and control of the child.

(2) This section does not apply where a child is born to a surrogate who has consented to an application under section 8.2.

(3) If the court finds that a living person is or is not a parent of a child, the court may make a declaration to that effect.

(4) If the court finds that a deceased person is or is not a parent of a child, ~~*conceived before that person's death*~~ the court may make a declaration to that effect.

(5) In making a declaration under this section, the court shall give effect to any applicable presumption set out in section 8 and any applicable provision of section 8.1.

(6) The court has jurisdiction under this section if

(a) the child is born in Alberta, or

(b) an alleged parent resides in Alberta.

(7) An application or declaration may not be made under this section if

(a) the child has been adopted, or

(b) the declaration sought would result in the child having more than 2 parents.

(8) When making a declaration of parentage, the court may, in order to facilitate registration under the *Vital Statistics Act*, order one or more of the following:

(a) if the child is less than 12 years of age at the time the application is made, that the Registrar of Vital Statistics register or amend the name of the child in accordance with section 10 of the *Vital Statistics Act*;

(b) that the Registrar of Vital Statistics add the name of a parent to the child's birth registration document;

(c) that the Registrar of Vital Statistics amend the parentage shown on the child's birth registration document.

(9) In making an order under subsection (8), the court shall consider the child's views and preferences.

(10) A declaration of the court that a person is not a parent of a child does not affect

(a) any rights and duties that have been exercised and observed, or

(b) any interests in property that have been distributed before the declaration is made, unless the court orders otherwise.

Family Law Act General Regulation

Definitions

1(1) In this Regulation,

(a) "Act" means the *Family Law Act*;

(b) "party" means a party as defined in the *Provincial Court Procedures (Family Law) Regulation*;

(c) "surrogate" means a surrogate within the meaning of section 5.1(1)(d) of the Act.

(2) Words and expressions that are used in section 4 and that are not defined in this section have the meanings assigned to them under the *Income Tax Act* (Canada).

Consent by deceased person

1.1(1) For purposes of section 8.1(5.1) of the Act, the consent of the person referred to in section 8.1(1)(a) or (1)(b) must contain the following statements:

(a) that the person giving the consent is the person referred to in section 8.1(1)(a) or (1)(b);

(b) that the person consents to the use for reproductive purposes after the person's death of the reproductive material or an embryo provided under section 8.1(1)(a) or (1)(b) by a person who is married to or in a conjugal relationship of interdependence of some permanence with the person referred to in section 8.1(1)(a) or (1)(b) at the time of that person's death;

(c) that the person understands that an application may be brought to the court for a declaration that the person is the parent of a child conceived after the person's death using the reproductive material or an embryo provided under section 8.1(1)(a) or (1)(b);

(d) that the person understands that the court cannot make a declaration that the person is a parent of the child conceived after the person's death using the reproductive material or an embryo provided under section 8.1(1)(a) or (1)(b) unless the person consents.

(2) The consent must be

(a) in writing,

(b) dated, and

(c) signed by the person referred to in section 8.1(1)(a) or (1)(b) and witnessed by a person other than a person who would become the parent of a child under section 8.1(5.1).

(3) Before death, a person may withdraw consent by written notice to the person referred to in section 1.1(1)(b) of this Regulation.

(4) Notwithstanding anything in this section, consent given to the after death use for reproductive purposes of a person's reproductive material or an embryo under an enactment of Canada is proof of consent for purposes of section 8.1(5.1) of the Act.

Consent to declaration

2(1) In this section,

(a) "declaration" means a declaration by a court under section 8.2(1) of the Act;

(b) "genetic donor" means a person referred to in section 8.2(1)(b) of the Act.

(2) The consent of a surrogate to a declaration under section 8.2(6) of the Act must contain the following statements:

(a) that the person giving the consent is the surrogate;

(b) that the surrogate gave birth to the child and the date on which the birth occurred;

(c) that the surrogate understands that she is the parent of the child;

(d) that the surrogate understands that an application is being made to the court for a declaration that the genetic donor is a parent of the child;

(e) that the surrogate understands that if the court makes a declaration that the genetic donor is a parent of the child, the surrogate will cease to be recognized as the parent of the child;

(f) that the surrogate understands that the court cannot make a declaration that the genetic donor is a parent of the child unless the surrogate consents to the application;

(g) that the surrogate understands that if she consents to the application, the genetic donor will be declared to be a parent of the child and will be deemed to be a parent at and from the time of birth of the child;

(h) that the surrogate understands that if the court makes a declaration, the other parent of the child will be,

(i) if section 8.1(2) of the Act applies, the person described in section 8.1(2)(b)(i) and (ii) of the Act; ~~*or*~~

(ii) if section 8.1(3) of the Act applies, the person described in section 8.1(3)(b)(i) and (ii) of the Act; *or*

(iii) if section 8.1 (5.1) of the Act applies, the person described in section 8.1 (5.1)(b)(i) and (ii) of the Act;

(i) that the surrogate freely and voluntarily consents to the application, and understands that by her consent she gives up any obligations, powers, responsibilities or entitlements with respect to the child.

(3) The consent of the surrogate must be

(a) in writing,

(b) dated, and

(c) signed by her and witnessed by a person other than a person who is to become a parent of the child as a result of the declaration under section 8.2(6) of the Act.